IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-329

CORDECO DEVELOPMENT CORPORATION,

*Petitioner,*

*against*

ANTONIO SANTIAGO VASQUEZ, INEZ ACEVEDO, as Sub-Secretary of the Department of Natural Resources of the Commonwealth of Puerto Rico, and individually; ZENON MERCADO MERCADO, as an Officer of the Department of Natural Resources, and individually; and PEDRO NEGRON RAMOS, individually and in his capacity as the Secretary of the Department of Natural Resources,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOHN J. BOWER
*Counsel for Petitioner*
415 Madison Avenue
New York, New York 10017

JOHN J. BOWER,
MICHAEL M. FUTTERMAN,
CHARLES A. CORDERO,
*Of Counsel.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above entitled action pursuant to its decision rendered June 25, 1976.

## Opinion Below

The opinion of the court of appeals, which to date is unreported, is annexed to this petition as provided in Rule 23 (i) of the Rules of the United States Supreme Court.

## Jurisdiction

The judgment of the court of appeals was dated and entered on June 25, 1976. This petition seeking a writ of certiorari is filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

## Questions Presented

**I. Qualified Immunity—Applicability to Public Officials Failing to Act While Under a Statutory Duty to Act.**

Respondent Vasquez, as Secretary of the Department of Public Works of the Commonwealth of Puerto Rico in 1969 through 1972, and respondent Negron, as Secretary of the Department of Natural Resources since late 1974, each was statutorily mandated to decide all sand extraction applications filed with the Commonwealth within sixty (60) days of filing.

Neither Vasquez nor Negron ruled upon the application of the Cordeco Development Corporation filed in 1969 though all other landowners similarly situated received permits within the statutory time. Cordeco's application went unresolved from 1969 through 1975, and as a result, it could neither excavate nor sell its sand. Thus, the following questions arise:

1. Can an official of the executive branch of government under a statutory duty to perform certain designated conduct claim a qualified immunity from liability in damages where in fact he does not perform his statutory duty and remains inactive?

2. Do the decisions of this Court in *Wood* v. *Strickland,* 420 U.S. 308 (1975) and *O'Connor* v. *Donaldson,* 422 U.S. 563 (1975), specifically apprise both the public and executive officials of the scope of conduct that gives rise to a



qualified immunity so as to meet a fundamental test of fairness?

**II. Qualified Immunity—Necessity of Establishing Evidentiary Procedures.**

The court below tacitly affirmed the charge of the district court and the special interrogatory answered by the jury stating that the defendants were entitled to a qualified immunity if they acted within the scope of their authority over a discretionary function. Thus, the following questions arise:

1. How must a jury be charged upon the propriety of granting a qualified immunity under the objective and subjective tests raised by this Court in *Wood* v. *Strickland, supra*?

2. Upon which party falls the burden of proof of the dual standard necessary to claim a qualified immunity and what is the burden of proof necessary either to establish or defeat the claim of immunity?

**III. Compensatory Damages—Creation of a Standard of Damages in Actions Arising Under 42 U.S.C. § 1983 and 42 U.S.C. § 1985.**

The court of appeals tacitly held that as the value of plaintiff's land had increased on paper, it could not claim a loss of use during those years that it was deprived of the sole economic use of its land by the wrongful conduct of the respondents. Thus, the following questions arise:

1. In awarding damages for violations of 42 U.S.C. § 1983 and 42 U.S.C. § 1985, must the trial court administer federal common law or can it choose between the federal common law and the common law of the local jurisdiction, whichever provides the most adequate relief to the party deprived of federally secured rights?

2. May a plaintiff deprived of the use of its land by the discrimination of a public official acting under color of law recover damages for such loss of use where the land is still in its possession and has not been destroyed in whole or part?

3. What is the appropriate measure of damages for loss of use of property caused by a violation of 42 U.S.C. § 1983 and 42 U.S.C. § 1985?

### IV. Attorneys' Fees—Bad Faith Exception to the American Rule.

The court of appeals held that the trial court's award of attorneys' fees was improper under the case of *Alyeska Pipeline Service Co.* v. *The Wilderness Society*, 421 U.S. 240 (1975) as it was based upon bad faith prior to the litigation and not bad faith in either bringing the suit or taking place during the suit and was further inappropriate as it was awarded in addition to punitive damages. Thus, the following questions arise:

1. When must bad faith by a party occur in order to be a viable exception to the traditional American Rule against awarding attorneys' fees as recognized in *Alyeska*?

2. In cases arising under the Civil Rights Acts, may the trial court, in its discretion, award both attorneys' fees and punitive damages?

## Statutes Involved

The pertinent provisions of the Civil Rights Act, 42 U.S.C. § 1983 and 42 U.S.C. § 1985 as well as the sand extraction law in question, 28 R&R of P.R. 220-3(f) are set forth in Appendix C (infra, page 26a).



## Statement

### The Land in Question

In 1949, there existed an undivided tract of property in northwest Puerto Rico owned entirely by a family surnamed Abreu. The land was composed of sand dunes bordering on the ocean and land behind the dunes on which simple farming could be performed. In 1949, a local attorney divided the entire property among six (6) Abreu heirs, the value of the six (6) equaling the value of the previously undivided whole. All six deeds were identical in describing the northern border of each parcel as the dunes of the Maritime Zone.

In October of 1949, the husband of one of the heirs retained a local surveyor to prepare a map of the tract received by his wife. The surveyor, Raul Marin Pedraza, was told to exclude the sand dunes as they had no agricultural value. The son of the owner was to testify that this was done solely to save the owner land taxes. However, from the division of the property until its eventual sale in 1956, the owner exercised dominion and control and paid taxes on the entire sixty-one (61) acres, that is beyond the Marin boundary and extending to the seashore. The sole copy of the map was given to the husband upon its completion.

In 1956, the land was sold to Carlos B. Cordero. The deed of sale duplicated the prior division, with the northern boundary being the same as on the other five tracts—the dunes of the Maritime Zone. From 1956 to 1967, no Abreu family member appeared on the Cordero land, Cordero exercising dominion and control and paying taxes on the entire sixty-one (61) acres running to the seashore.

In 1967, a construction boom in Puerto Rico caused the previously worthless sand to be in great demand as a construction material. As a result, the Cordero farm,

having approximately 800,000 cubic meters of sand and originally bought for $6,400.00, now was worth in excess of one million dollars.

In December of that year, the son of the seller to Cordero, Jose Bravo Abreu, suddenly claimed that the sand dunes were not part of the 1956 sale and demanded that Cordero cease to exercise control of the dunes. Concurrently, he sent a letter to the respondent Mercado, an official of the engineering section of the Department of Public Works of the Commonwealth of Puerto Rico, in which he claimed the sand dunes as his family's and enclosed as "proof" a copy of the deed in question and the Marin Map. After almost twenty years, the private, unregistered and purposely partial map that was drawn to save land taxes surfaced from the coffers of the Abreu family—a map theretofore unknown to Cordero.

**Creation of Map 35-68**

In early 1968, the official in charge of real property records received a request from the respondent Acevedo, legal advisor to the Secretary of the Department of Public Works, that an official map of the Cordero land be prepared. In February, 1968, a public works surveyor appeared on the Cordero land without the knowledge or permission of Cordero and upon orders prepared a survey, not from independent judgment, but by following a map he was given and locating fixed points from it. That map was the ubiquitous Marin map. The governmental map that resulted, #35-68 (plaintiff's exhibit 4), was denominated "Deslinde Zona Maritima Demarcation"—Demarcation of the Maritime Zone.

**The Sand Extraction Law**

In June of 1968, the legislature of the Commonwealth enacted Law 132 for the extraction of sand from the terrestrial cortex (denominated Section 3.6 of the Regu-



lations of the Public Works Department [28 R&R of P.R. 220-3(f)]). Henceforth, a permit would have to be issued in order for a landowner to extract sand from his property. Further, pursuant to the law, the Secretary, and only the Secretary, of the Department of Public Works and later the successor Department of Natural Resources was required to decide within sixty (60) days of application upon the granting or denial of such request.

**Removal of Sand by Similarly Situated Landowners**

Following Law 132 taking effect all five of Cordero's neighboring landowners applied for and received permits within the statutory time limit. The northern boundary of each property was identical to that of Cordero's land—the seashore.

**Sand Extraction Application of Cordero's Successor**

In 1969, the Cordeco Development Corporation was formed, owned entirely by the children of Carlos Cordero. The corporation purchased the elder Cordero's land and on June 10, 1969 applied to the Department of Public Works for a sand extraction permit. The local agent of Cordeco, Cordero's son, Charles A. Cordero, was told by the respondent Mercado that the permit would be granted and that it usually took some twenty (20) days to issue. From June of 1969 to November of 1970, despite repeated protestations, the Cordeco permit was neither granted nor denied. More precisely it was not acted upon.

In November of 1970, respondent Acevedo met with Charles Cordero and, using the Marin map as "proof," informed him that the sand dunes did not belong to Cordeco. Attorney Acevedo would later admit that neither she nor the Department of Public Works had any right to adjudicate title to the land. The application, made in June of 1969, stood unresolved and unacted upon through 1970, 1971, 1972, and the greater part of 1973.

In 1971, the present action was commenced in the United States District Court for the District of Puerto Rico pursuant to 42 U.S.C. § 1983 and 42 U.S.C. § 1985.*

The head of the Department of Public Works from 1969 through 1972 was the respondent Vasquez. Whereas it was the statutory duty of the Secretary to grant or deny the application within sixty (60) days of filing, it is clear that during his entire term of office the Cordeco application remained unresolved.

During this time, however, the extraction of sand flourished. An aerial photograph of the area would show the abundent removal of sand from all properties except one: that belonging to Cordeco Development Corporation, the only parcel not owned by a member of the politically prominent Abreu family. The same officials of the Department of Public Works who would not act upon Cordero's application due to the "ambiguous" northern boundary, at no time denied a permit or in any way challenged the applications of the other five property owners whose northern boundaries were identically described to that of the Cordeco property.

In 1973, the duties of the Department of Public Works were assumed by the newly formed Department of Natural Resources. The respondent Acevedo became the Undersecretary and, pursuant to an amended complaint, the new Secretary, Cruz Matos, was named as a defendant.**

Upon his being brought into this suit, Matos met with Mercado and Acevedo and insisted that a permit be drawn and given to Cordeco. Pursuant to the permit, drawn upon the advice of Acevedo and Mercado, the limit of Cordeco's land was deemed to be the northern boundary of Map

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* A decision rendered during the proceedings was reported at 354 F. Supp. 1354 (D.C.P.R., 1972).

** Following the openings of counsel, Matos' motion to dismiss was granted.



35-68, thereby excluding the sand dunes. The permit issued was, therefore, a sham and a nullity as it gave Cordeco the right to extract sand where none existed. Upon deposition, Matos stated that there was a conspiracy in which he was being made the "fall guy." Following Cordero's complaints regarding the "permit" and Matos' questioning of respondents Mercado and Acevedo, he was compelled to resign.

In late 1974, it appeared that a real permit would at long last be issued by Hector Lopez Pumerejo, serving an interim appointment as Secretary of the Department of Natural Resources. However, respondents Acevedo and Mercado, no longer in government employ, filed a motion to intervene and stop the issuance of the permit. Negotiations ceased, Lopez's appointment was terminated and he was replaced by the present Secretary, respondent Pedro Negron Ramos. Negron, in turn, refused to act on Cordeco's application, citing as his reason the existence of the Matos permit (though a known nullity). A bureaucratic shield was thus erected on the theory, first stated by respondent Negron at trial, that no action was mandated since Cordeco, after waiting some six years, had not filed a new application.

**Cordeco's Damages**

The Cordeco land contains approximately 800,000 cubic meters of sand of which approximately 90 percent can be mined while still giving ecological protection to the shoreline. During the years 1970 through 1975 when the Cordeco neighbors removed virtually all their sand, the price per cubic meter rose from $1.00 to $2.00 per cubic meter. Whereas Cordeco cannot presently market sand as construction has all but ceased on the island, petitioner, contrary to what was stated in the opinion below, did not seek speculative damages as to the diminution in the ability to sell sand, but rather sought only the most conservative return for the six (6) years it was de facto and de jure

deprived of the effective *use* of its land: to wit, an 8 percent return, simple interest, upon the principal it could have realized had it been permitted to sell sand on the open market as had all its neighbors. Said damages were $465,000.00 to $500,000.00. Both the amount and propriety of such damages went unchallenged during the trial and post trial motions.

**Proceedings Below**

The jury found that each of the four named defendants had violated the civil rights of the plaintiff and that the defendants Acevedo, Mercado and Negron conspired to violate the civil rights of the plaintiff. The jury awarded $500,000.00 in compensatory damages jointly and severally against each defendant and $250,000.00 in punitive damages as against the defendants Acevedo and Mercado. The court permitted attorneys for the plaintiff to submit affidavits regarding attorneys' fees which were stated to be in the amount of $71,800.00 The court further permitted post trial motions and, in its judgment rendered October 22, 1975, reduced compensatory damages to $1.00 as against the defendants Acevedo and Mercado, and awarded punitive damages as against the defendant Acevedo in the amount of $15,000.00 and as against the defendant Mercado in the amount of $5,000.00. The defendants Vasquez and Negron were granted immunity pursuant to the cases of *Scheuer* v. *Rhodes, infra,* and *Wood* v. *Strickland, infra.* Attorneys' fees in the amount of $40,000.00 were awarded as against the defendants Acevedo and Mercado pursuant to the bad faith exception to the American Rule as stated in this Court's opinion in the case of *Alyeska Pipeline Service Co.* v. *The Wilderness Society,* 421 U.S. 240 (1975).

On appeal to the Court of Appeals of the First Circuit, that court affirmed the lower court's judgment on all issues with the exception of the award of attorneys' fees which was remanded to the district court for further proceedings.



## REASONS FOR GRANTING THE WRIT

### I. The decision below granting immunity to executive officials who failed to perform their statutory duty is in direct conflict with the principles of qualified immunity as stated by this Court.

*Scheuer* v. *Rhodes,* 416 U.S. 232 (1974) is the watershed of this Court's effort to resolve the question of whether an official of the executive branch of government is entitled to an absolute or qualified privilege over his acts. Prior thereto, the privilege was absolute, as with legislative and judicial officials, *Tenny* v. *Brandhove,* 341 U.S. 367 (1951); *Pierson* v. *Ray,* 386 U.S. 547 (1967), and was granted upon showing that the act in question was discretionary and performed within the scope of authority. In *Scheuer,* this Court concluded that an absolute immunity was neither necessary nor warranted to insure the protection of the official in the conducting of the decision-making process that is government. Henceforth, a qualified immunity based upon the totality of the official's conduct and a good faith reasonable belief in the constitutionality of that conduct would be afforded the official.

The scope of the qualified immunity was clarified in *Wood* v. *Strickland,* 420 U.S. 308 (1975); *O'Connor* v. *Donaldson,* 422 U.S. 563 (1975) and *Gumanis* v. *Donaldson,* 422 U.S. 1052 (1975). In *Wood,* this Court made it clear that "reasonableness" as stated in *Scheuer* was not merely the objective function of the official known intention, but also must be viewed subjectively in the light of the likely possibility of the effect of that conduct upon the fate of the governed. There, in the context of school discipline,*

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* The First Circuit in the case of *Morris* v. *Travisono,* 528 F.2d 856 (1st Cir., 1976) at p. 858, note 5 stated: "*Wood* v. *Strickland's* discussion of immunity and Section 1983 was limited to 'the specific context of school discipline' id. at 322, 95 S.Ct. at

*(footnote continued on following page)*

this Court held that an official would be immune from liability for damages under 42 U.S.C. § 1983:

> ". . . if he knew or reasonably should have known that the action he took within the sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with a malicious intention to cause a deprivation of constitutional rights or other injury to the student."

**The Necessity That Officials Act in Order for the Public to Be Served.**

Inherent in each of this Court's recent decisions on this subject is the necessity that an official perform his duty as a condition precedent to claiming an immunity over his acts. As stated in *Scheuer, supra,* at page 241:

> "The public interest requires decisions and action to enforce laws for the protection of the public . . . Public officials, whether governors, mayors, or police, legislators or judges, who fail to make decisions when needed or do not act to impliment decisions when they are made, do not faithfully and fully perform the duties of their office. Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error than not to decide at all."

The very essence or rationale, then, behind the existence of a qualified privilege is that a public official must be

*(footnote continued from preceding page)*

1001, but the language concerning unquestioned and clearly established constitutional rights appears to represent a more general principle. *See, O'Connor* v. *Donaldson, supra, Gumanis* v. *Donaldson, supra. See also, Knell* v. *Bensinger,* 522 F.2d 720 (7th Cir., 1975); *Glasson* v. *City of Louisville,* 518 F.2d 899, 908-909 (6th Cir., 1975)."



given reasonable latitude in order for the government to function properly. Nevertheless, central to this entire concept is the necessity that a public official affirmatively *act* within his office—he cannot sit back and expect an absolute immunity simply due to his employment by the State. The case law dictates that affirmative conduct on the part of the public official must take place as a condition precedent to the qualified immunity attaching.

**The Decision Below.**

The court of appeals ruled that as defendants Negron and Vasquez "acted within the bounds of their lawful authority and discretion," the district court was proper in granting a qualified immunity under the *Scheuer* and *Wood* decisions. This opinion seriously misconstrues the two decisions and fails, as well, to consider *O'Connor* and the various court of appeals decisions construing the Supreme Court holdings. Further, the decision is in conflict with the applicable principles handed down by this Court. It so seriously broadens the scope of the qualified immunity as to invest government officials with an immunity over their conscious inaction and so threatens the governed as to manifest review thereof. Such question must be resolved by this Court if the calculated balance between elected and governed is to remain strong and our people served by the executive branch of government.

**An Official Consciously Refraining From Carrying Out Statutory Duties May Not Claim an Immunity Over the Consequences of His Inactivity.**

In each of the post-*Scheuer* cases ruled on by this Court, as well as the opinions of the various courts of appeals construing and applying *Scheuer, Wood,* and *O'Connor,* the conduct in question was either an affirmative act by officials involved with the plaintiffs: i.e., *Knell* v. *Bensinger,*

*supra,* in which a prisoner was allegedly denied mail privileges; *Bursey* v. *Weatherford,* 528 F.2d 483 (4th Cir., 1975), in which a state law enforcement official allegedly interfered with the plaintiff's rights in a criminal case; *Morris* v. *Travisono, supra,* in which a prisoner's rights were allegedly violated by a correctional officer's use of tear gas; *Mukmuk* v. *Commissioner of Dept. of Correctional Services,* 529 F.2d 272 (2d Cir., 1976), in which a prisoner was allegedly denied the right to establish a school in prison and was confined to a solitary cell, and *Gonzalez* v. *Colon,* —— F.2d —— (1st Cir., No. 75-1270, May 28, 1976), in which an employee of the Department of Social Services was transferred from a competitive to a noncompetitive department; or the cases involved defendants having no contact with the act in question and sued merely in their representative or official capacity. Neither this Court nor the court of appeals has considered a case wherein the officials claiming the immunity consciously failed to perform such acts as were mandated, not by a general code of responsibility or protocol of an executive department of government, but by a specific statute enacted by the local legislature and employed every day by the department of government the official headed.

Whereas the court below stated that immunity was granted over the "acts" of respondents Vasquez and Negron, it was never challenged that during the tenure of Dr. Vasquez from 1969 to 1972 that an application that was statutorily to be resolved within sixty (60) days of submission remained unacted upon. Further, respondent Negron admitted that while he knew that the permit given Cordeco by Matos was a nullity he also did nothing as "there was no new application before [him]."

Therefore, it has been tacitly held by the courts below that inactivity on the part of a government official will in fact permit that official to enjoy the qualified privilege. The consequence of such a decision would be to permit



public officials to abstain from making decisions on each and every occasion that the decision is difficult or may subject them to civil liability. The service of the public clearly would be pervasively interrupted by allowing an official to claim immunity whether or not he affirmatively or negatively acts during his tenure in office.

As the rationale behind the privilege is to cause government to act on behalf of the public, where no act, correct or incorrect, has been performed, the reason for granting the qualified privilege is absent, and as the rationale is absent, so is the necessity for the rule. Where the public official fails to act and seeks immunity over his inaction, he is not seeking immunity over a possible honest mistake, but seeks that immunity solely due to his position. Such would be an absolute privilege which, as aforesaid, does not exist.

**The Boundaries of a Qualified Immunity Must Be Specifically Stated so as to Meet a Test of Fairness.**

The necessity to review the concept of an official's seeking a qualified immunity based upon inaction should be measured against this Court's decisions in the area of due process as it applies to the language of penal statutes. In *Connally* v. *General Construction Co.,* 269 U.S. 385 (1926), this Court stated the applicable principle as follows, at page 391:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

Further, in *Giacco* v. *Pennsylvania,* 382 U.S. 399 (1966), this Court stated, at page 402:

> "It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in a particular case."

The granting of an immunity, whether absolute or qualified, is a product of the case law and not specific statutory law under 42 U.S.C. § 1983 and 42 U.S.C. § 1985. As such, while the statutes in question are not vague, the standard for the granting of an immunity as formulated from the case law derived from such statutes must be made specific if an applicable standard for both the governed and the official is to meet the test of fairness. At present, both the public and officials, attorneys, judges, and juries must guess as to the boundaries of the "acts" referred to in *Scheuer, Wood,* and *O'Connor* as well as their progeny.

The petitioner believes that the public's right to be specifically apprised of the level of accountability of its servants in government, both elected and appointed, is so fundamental, that this case should be reviewed by this Court and a rule promulgated which defines the type of "act" for which a qualified immunity will be afforded and which further holds that an executive official under a statutory duty to perform a specific function may not claim an immunity from liability in damages for the consequences of his failure to so perform that function.



## II. The Court must establish evidentiary standards for the administration at trial of the doctrine of qualified immunity.

The creation of a standard of qualified immunity by this Court has not, in turn, given rise to the corresponding evidentiary standards necessary for its administration at trial.

This Court in *Wood* v. *Strickland, supra,* failed to formulate an applicable charge on the defense of qualified immunity. Neither was the issue completely resolved in *O'Connor* v. *Donaldson, supra.*

Without an appropriate charge reflecting the dual standard of conduct on the part of a public official as mandated by *Wood* v. *Strickland, supra,* the jury lacks the proper basis upon which to judge the question of qualified immunity.

Clearly, the charge of the district court herein mandating solely that the defendants act within the scope of their employment over discretionary functions in order to be privileged to a qualified immunity did not meet this dual qualification. A similar charge was held by this Court to be improper in the case of *Skehan* v. *Board of Trustees of Bloomsburg State College,* —— U.S. ——, 95 S.Ct. 1986 (1975), on remand —— F.2d —— (3rd Cir., No. 73-1613, 1976). This Court vacated the previous order of the Third Circuit, 501 F.2d 31 (3rd Cir., 1974), which adopted a similar charge to that made by the district court herein and remanded in order for the circuit court to review the question of a qualified immunity in light of *Wood* v. *Strickland, supra.*

Further evidentiary problems left unanswered in *Wood* and *O'Connor* and raised in *Skehan,* at page 14,* were "which side has the burden of going forward with evidence

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* Unpublished opinion.

and which side has the burden of proof on the two qualifications to the defendant's immunity?" Whereas *Skehan* stated that the qualifications of immunity stated in *Wood* v. *Strickland, supra,* are matters of defense with the burden of proof placed upon the defendant to convince the trier of fact by a preponderence of the evidence that the objective and subjective standards are met, such is manifestly unresolved by this Court.

The failure to establish such evidentiary standards was clearly reflected in the charge of the district court, tacitly approved by the court below, which considered neither the dual standard nor the applicable burden of proof.

It therefore falls to this Court to establish such evidentiary rules as are necessary so as to permit the trial courts to properly administer the standard established in *Wood* v. *Strickland, supra.*

## III. This Court must create a juridical standard of damages for an individual's loss of use of property caused by unequal treatment by a public official acting under color of law.

Until the case of *Lynch* v. *Household Finance Co.,* 405 U.S. 538 (1972), the federal courts conflicted as to whether Section 1983 afforded relief for property loss resulting from conduct of a public official acting under color of law. In *Lynch,* at page 552, this Court in holding that Section 1983 did provide redress for lost property rights stated:

> "The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel is in truth a 'personal' right, whether the property in question be a welfare check, a home, or a savings account."



As stated in the case of *Shelly* v. *Kramer,* 334 U.S. 1 (1947), at page 10:

> "Equality in the enjoyment of property rights was regarded by the framers of that Amendment [14th] as an essential pre-condition to the realization of other basic civil rights and liberties . . ."

See also *Fuentes* v. *Shelvin,* 407 U.S. 67 (1972).

The decision below is an outgrowth of the nebulous law of damages as it applies to actions brought pursuant to the Civil Rights Laws. In affirming the lower court's reduction of the jury's award of compensatory damages to Cordeco, the court denied that in fact there was damage caused by loss of use, stating that Cordeco continues to own what on paper appears to be a valuable piece of property. The damages sought by the petitioner related solely to the loss of use of property during such time as those similarly situated were allowed by the respondent public officials to enjoy the economic opportunity inherent in their property.

This Court has never considered an issue of distinct national significance, to wit, the measure of damages for loss of use of property caused by the conduct of a public official acting under color of law while that property remains in the possession of the owner and is neither appropriated nor destroyed by such conduct.

### Recognition of Damages for Loss of Use of Property.

This Court, in the case of *Mitchell* v. *W.T. Grant Co.,* 416 U.S. 600 (1974), has recognized that loss of use of property is a compensable damage. In construing a Louisiana sequestration statute, *Mitchell* stated, at page 606:

> "Damages would compensate for the period during which the buyer was deprived of the *use* of the prop-

erty, but are not restricted to pecuniary loss." (Emphasis added.)

Loss of use is recognized as being of prime importance in compensating an owner for damages inflicted by another. As stated in Section 152 of *American Jurisprudence 2d,* Damages:

> "Ownership of an item of property carries with it the right to control the use of that item of property. Therefore, where the defendant tortiously injures, destroys, or takes an item of property, there has been a loss of one of the valuable rights or interests in property—the right to use the property. Awarding the plaintiff only the cost of repair or the decrease in market value fails to recognize that he has lost the use of the property item during the time reasonably needed to repair or replace it. . . . Awarding damages which do not compensate for the loss of use fails to recognize that the right to use promptly is a valuable incident of ownership."

The decision below negated any value to loss of use of the petitioner's property although the court left unanswered the question of a viable measure of damages in "cases involving complete deprivation of use of land." The court did not believe this question needed to be answered as it felt that the mining of sand was merely "an asset" of the land. It is clear that the mining of sand herein was the only asset this land possessed.

**Conflict in Circuits Regarding the Common Law Measure of Damages in Actions Under § 1983.**

Relief for a violation of Section 1983 has been construed in various circuits as being governed by the federal common law of damages. *Basista* v. *Weir,* 340 F.2d 74 (3rd Cir., 1965); *Caperci* v. *Huntoon,* 397 F.2d 799 (1st Cir., 1968); *Kerr* v. *City of Chicago,* 424 F.2d 1134 (3rd Cir.,



1970). Such a national standard, as opposed to the measure of damages of the individual jurisdiction, was thought to be the best means of achieving uniformity of relief under the Civil Rights Law.

Whereas the court below chose to administer federal common law, at least one other circuit construing a decision of this Court has held that the common law of the applicable jurisdiction may be invoked if it provides the most appropriate form of relief. In *McDaniel* v. *Carroll,* 457 F.2d 968 (6th Cir., 1972), the court, in considering the opinion of this Court in *Sullivan* v. *Little Hunting Park, Inc.,* 396 U.S. 229 (1969), held, at page 969:

> "In civil rights cases, the common law of a state may be used on the issue of damages where it better serves the policies expressed in the federal statutes."

Appropriately, the lower court herein was apprised of the case of *Blanco* v. *Capital,* 77 P.R.R. 607 (S. Ct. P.R., 1954), rendered by the highest court of Puerto Rico, in which the court rendered damages of six percent interest for the time of the deprivation of the use of plaintiff's land although the land had appreciated during the period of such deprivation.

A clear conflict thus has developed in the circuits' consideration of the standard of damages to be applied in actions brought pursuant to the Civil Rights Laws, a conflict that merits resolution by this Court.

**Remedies Must Be Adjusted to Provide Appropriate Relief to Individuals Deprived of Federally Secured Rights.**

Whereas the federal courts have yet to recognize a clear standard of compensation in cases involving loss of use of property as a result of § 1983 discrimination, this Court has recognized that where rights are secured by the Constitution or federal statutes, damages must fit the offense and the injury. In *Sullivan* v. *Little Hunting Park, Inc.,*

*supra,* this Court in citing to the case of *Bell* v. *Hood,* 327 U.S. 678 (1946) stated, at page 239:

> "Where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. As it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."

It was concluded that:

> "The rule of damages, *whether drawn from federal or state sources,* is a federal rule responsive to the need whenever a federal right is impaired." (Emphasis added.)

And, as stated in the case of *J.I. Case Co.* v. *Borak,* 377 U.S. 426 (1964), at page 433:

> "It is for the federal courts to adjust their remedies so as to grant the necessary relief where federally secured rights are invaded."

**Establishing an Appropriate Measure of Damages Under 42 U.S.C. § 1983.**

Whereas this Court has established various measures of damages in property loss cases, see *The Amicable Nancy,* 3 Wheat, 546 (1818); *Preston* v. *Prather,* 137 U.S. 604 (1890); *U.S.* v. *Rogers,* 255 U.S. 163 (1921); *Seaboard Air Line Railway Co.* v. *U.S.,* 261 U.S. 299 (1923); *U.S.* v. *Creek Nation,* 295 U.S. 103 (1935), it is essential that it now resolve the apparent conflict in circuits regarding the measurement of damages in civil rights cases and create a standard to aid the lower courts other than the nebulous treatment the previous case law has afforded.



It is submitted that the proper measure of damages in a civil rights action is to be taken from that standard most appropriate to the loss sustained by the plaintiff.

## IV. The court below erred in reversing an award of attorneys' fees by abrogating the long accepted bad faith exception to the traditional American Rule.

The ability of a litigant as a "private attorney general" to obtain counsel fees as taxable costs was, prior to this Court's decision in *Alyeska Pipeline Service Co.* v. *The Wilderness Society,* 421 U.S. 240 (1975), an accepted exception to the traditional American Rule against a prevailing party recovering attorneys' fees as costs or otherwise. *Alyeska* held that such fees can no longer be obained by the "private attorney general" and recognized only four exceptions to the American Rule: (1) Allowing the trustee of a fund or property or a party preserving or recovering a fund to recover his fees from the fund or those enjoying its benefits. *Mills* v. *Electric Auto-Light Co.,* 396 U.S. 375 (1970); *Hall* v. *Cole,* 412 U.S. 1 (1973); (2) Allowing the imposition of fees as against the defendant for the "willful disobedience of a Court order." *Toledo Scale Co.* v. *Computing Scale Co.,* 261 U.S. 399 (1923); *Fleischman Distilling Corp.* v. *Maier Brewing Co.,* 386 U.S. 714 (1967); (3) Where fees are granted pursuant to statute or contract. *Hall* v. *Cole, supra;* or (4) When the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. *F.D. Rich Co., Inc.* v. *U.S. ex rel. Industrial Lumber Co.,* 417 U.S. 116 (1974); *Vaughn* v. *Atkinson,* 369 U.S. 527 (1962).

A series of circuit court cases decided since *Alyeska* have recognized the bad faith exception to the American Rule without further commenting on it. *Sebala* v. *Western*

*Gilette Inc.*, 516 F.2d 1251 (5th Cir., 1975); *Pupa* v. *Thompson*, 517 F.2d 693 (5th Cir., 1975); *Corist* v. *Richland Parish School Board*, 517 F.2d 1032 (5th Cir., 1975); *Committee on Civic Rights* v. *Romney*, 518 F.2d 71 (1st Cir., 1975); *Food Handlers Local 425* v. *Valmac Industries*, 528 F.2d 217 (8th Cir., 1975); *Jones* v. *N.Y.C. Human Resources Administration*, 528 F.2d 696 (2d Cir., 1976).

The decision of the court below was a significant departure from the heretofore recognized criteria for awarding attorneys' fees pursuant to the *Alyeska* case, other decisions of this Court, and the opinions of the various circuits. The court below abrogated the bad faith exception to the American Rule stating that the lower court's award based upon bad faith in the events giving rise to the litigation* is a "departure from the traditional concepts which authorized an award of fees for bad faith in bringing suit or in the course of litigation." Further, the court below held that as the district court premised its award of attorneys' fees upon events giving rise to the litigation, an award of fees was inappropriate where punitive damages were also awarded. The court specifically reserved decision "as to whether the award of attorneys' fees under the bad faith exception would be appropriate in the absence of an award of punitive damages."

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* The trial court awarded $40,000.00 as attorneys' fees jointly and severally against respondents Acevedo and Mercado. The court stated that had it not been for the "callous disregard of plaintiff's rights by defendants Acevedo and Mercado" the petitioner herein would not have been put to inordinate expense and delay in order to obtain a permit. It must be noted that such "inordinate expense and delay" was encountered not only from respondents Acevedo and Mercado but also from respondents Vasquez and Negron and that it took place not only preceding and necessitating the underlying action but took place for the four years that such action continued as may be gleaned from Note 13 of the decision of the court below.



The decision below departs from the concept of bad faith set by this Court. In *F.D. Rich Co.* v. *Industrial Lumber Co., supra*, page 129, this Court held:

> "We have long recognized that attorneys' fees may be awarded to a successful party when the deponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . ."

Footnote 17 immediately following this holding referred to the case of *Vaughn* v. *Atkinson, supra*, as support. *Vaughn*, citing to the case of *The Apollon*, 9 Wheat. 362, 6 L.Ed. 111 (1824), allowed attorneys' fees for events characterized as "willful and persistent" on the part of the defendant which events necessitated the lawsuit.

*Rich* and *Vaughn* evidence this Court's view that bad faith would include such conduct that gave rise to the litigation. *Alyeska*, while recognizing the applicability of *Rich* and *Vaughn* upon the question of bad faith, did not rule upon the scope of such exception as it was not germane to that decision. See also, *Hall* v. *Cole, supra*, wherein Justice Brennan stated, as recognized by the court below in Note 10 of its decision, that attorneys' fees may be awarded for bad faith either in the actions that led to the lawsuit or in the conduct of litigation.

The very recent decision of this Court in *Runyon* v. *McCrary*, —— U.S. ——, 44 U.S.L.W. 5034 (June 25, 1976) is also not dispositive on this question, though approving of *Rich* and *Vaughn* and pointing to a case by case inquiry of "that threshold of irresponsible conduct for which a penalty assessment would be justified." Such question is, therefore, unresolved by this Court.

The decisions of the various circuits provide some insight into this question, but are not uniform in their holdings or in agreement with the First Circuit. The Eighth Circuit recognizes the bad faith exception for acts giving

rise to the litigation or during the controversy. *Fowler* v. *Schwartzwalder,* 498 F.2d 143 (8th Cir., 1974); See also, *Doe* v. *Poelker,* 515 F.2d 541 (8th Cir., 1975), citing to *Bell* v. *School Board,* 321 F.2d 494 (4th Cir., 1963); and *Richardson* v. *Communications Workers of America,* 530 F.2d 126 (8th Cir., 1976). A similar view was held by the Fourth Circuit. *Bell* v. *School Board, supra; Thonen* v. *Jenkins,* 517 F.2d 3 (4th Cir., 1975). In *Thonen,* the court in sustaining an award of attorneys' fees on the ground of "obdurate obstenacy" examined conduct giving rise to the litigation as well as during the litigation itself. The Sixth Circuit in *Capers* v. *Cuyahoga County Board of Education,* 472 F.2d 1225 (6th Cir., 1973), an election case, denied attorneys' fees but examined evidence of conduct giving rise to the litigation on the question of bad faith. The Fifth Circuit in *Carter* v. *Noble,* 526 F.2d 677 (5th Cir., 1976), while recognizing the applicability of *Rich,* found bad faith based upon the frivolous defense raised by the defendant thus forcing the plaintiff to "employ counsel and bring this action." It is unclear if this circuit views both prelitigation conduct as well as that which occurred during the lawsuit itself as being the basis of an award of fees. The Seventh Circuit is apparently internally divided. Whereas *Adams* v. *Carlson,* 521 F.2d 168 (7th Cir., 1975), citing to *Townsend* v. *Edelman,* 518 F.2d 116 (7th Cir., 1975) and *Satoskar* v. *Indiana Real Estate Commission,* 517 F.2d 696 (7th Cir., 1975), stated, at page 698:

> "The standards for bad faith are necessarily stringent . . . We have examined the record in this case and we cannot say that *the decision to defend* the procedures that had been involved, or *the manner the defendants handled this litigation,* has been in bad faith," (emphasis added),

the same court in *Bond* v. *Stanton,* 528 F.2d 688 (7th Cir., 1976), cert. granted —— U.S. ——, 44 U.S.L.W. 3685



(June 1, 1976), citing to *Alyeska, supra,* and *Rich, supra,* stated, at page 690:

> "The bad faith which is the basis for the award may be in the conduct which necessitated the action or in the conduct occurring during the action."

The recently decided Third Circuit case of *Skehan* v. *Board of Trustees of Bloomsburg State College, supra,* presents a different analysis of this question. *Skehan* states that it is necessary to distinguish between bad faith giving rise to litigation and bad faith in the course of litigation. It is the latter that *Skehan* states "is the well recognized fourth exception to the American Rule." Upon a thoughtful review of the prior decisions including *Rich* and *Vaughn,* the court concluded that prelitigation conduct survives the *Alyeska* decision and is, in its own right, a fifth exception to the American Rule.

The decision below, negating an award of attorneys' fees based on prelitigation conduct, is in disagreement with the various circuits. As this question was not definitively treated in either *Alyeska* or *Runyon,* it is essential that this Court rule upon the specific question of the nature of the bad faith exception that will give rise to an award of fees. Specifically, only by a decision of this Court will the lower courts in whose discretion such an award lies, be guided as to when and in what manner bad faith must be exhibited before there can be an award of attorneys' fees.

**Attorneys' Fees and Punitive Damages**

The decision below further explores a serious question that has not been answered in any way by this Court. The decision states that in a civil rights case *both* punitive damages and attorneys' fees should not be granted based upon prelitigation conduct.

Whereas this Court's sole reference to this problem is in the dissent of Mr. Justice Stewart in *Vaughn* v. *Atkinson, supra,* at page 539, the court of appeals for the Seventh Circuit in *Morales* v. *Haynes,* 486 F.2d 880 (7th Cir., 1973), has stated: "Punitive damages and attorneys' fees may also be awarded in a Section 1983 case."

The basis for the award of punitive damages and attorneys' fees is the same, namely bad faith. Punitive damages are a means to punish a defendant for bad faith and to warn others, similarly situated, that such conduct will not be tolerated. Attorneys' fees, on the other hand, are awarded not to punish but to compensate for the conduct giving rise to or taking place during the litigation that necessitated the retention and expense of counsel. As stated in the decision of the trial judge herein:

> "Such an award in this case is not further punishment, but simply the court's attempt to arrive at substantial justice and assure that as a practical manner the courts will remain open to those persons seeking to vindicate their constitutional rights in the face of intentional disregard of such rights by government officials."

Each award is separate and distinct as a remedy to a party.

The decision below is in conflict with the Seventh Circuit and has never been resolved by this Court. The recent *Alyeska* case abrogating the doctrine of the "private attorney general" as a means to award attorneys' fees has driven plaintiffs in many cases cited herein to seek an award of fees under the bad faith exception to the American Rule. As much of this litigation is in the area of civil rights claims wherein both compensatory and punitive damages as well as attorneys' fees are sought, this Court must guide the district courts on the availability and extent of an award of both attorneys' fees and punitive damages to the prevailing parties.



## CONCLUSION

**For the foregoing reasons the petition for a writ of certiorari should be granted.**

Respectfully submitted,

JOHN J. BOWER
*Counsel for Petitioner*

JOHN J. BOWER,
MICHAEL M. FUTTERMAN,
CHARLES A. CORDERO,
*Of Counsel.*

# APPENDIX A

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 75-1424

CORDECO DEVELOPMENT CORPORATION,
PLAINTIFF, APPELLANT,
*v.*
ANTONIO SANTIAGO VASQUEZ; INEZ ACEVEDO, as Sub-Secretary of the Department of Natural Resources, and individually; ZENON MERCADO MERCADO, as an Officer of the Department of Natural Resources, and individually; PEDRO NEGRON RAMOS, individually and in his capacity as the Secretary of the Department of Natural Resources,
DEFENDANTS, APPELLEES.

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No. 75-1457

CORDECO DEVELOPMENT CORPORATION,
PLAINTIFF, APPELLEE,
*v.*
ANTONIO SANTIAGO VASQUEZ, et al.,
DEFENDANTS, APPELLEES.

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INEZ ACEVEDO CAMPOS, et al.,
DEFENDANTS, APPELLANTS.

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APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
(HON. JAMES C. TURK,* *U.S. District Judge*)

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Before COFFIN, *Chief Judge,*
MCENTEE and CAMPBELL, *Circuit Judges.*

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* Of the Western District of Virginia, sitting by designation.

*Appendix A.*

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*John J. Bower,* with whom *Charles A. Cordero* and *Michael M. Futterman,* were on brief, for Cordeco Development Corporation.
*Ronaldo Rodriguez Ossorio,* Assistant Solicitor General, with whom *Miriam Naveira De Rodon,* Solicitor General, was on brief, for Antonio Santiago Vazquez and Pedro Negron Ramos.
*A. Santiago Villalonga,* with whom *Hartzell, Ydrach, Mellado, Santiago, Perez & Novas* was on brief, for Inez Acevedo Campos and Zenon Mercado.

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June 25, 1976

McEntee, *Circuit Judge.* The present appeals arise from a suit for damages and injunctive relief brought by plaintiff Cordeco Development Corporation ("Cordeco") against four officers of the Commonwealth of Puerto Rico, charging a violation of plaintiff's constitutional rights under 42 U.S.C. §§ 1983, 1984 and 1985. The court *sua sponte* empanelled an advisory jury, pursuant to Fed. R. Civ. P. 39 (c), which rendered a verdict on May 14, 1975, in the form of answers to special interrogatories propounded by the court. The court accepted most of the jury's findings with respect to liability, but reduced the damages awarded Cordeco.

The district court's findings are set forth in its unpublished opinion of October 22, 1975. Mr. Carlos Cordero purchased a parcel of land from Mrs. Antonia Abreu Diaz by deed dated December 30, 1956. This tract was part of a larger parcel which had been subdivided in 1948 into six tracts of approximately equal value. Mr. Cordero paid $6,400 for his parcel and used the land as a farm in subsequent years. The northern boundary of the tract was described as the "dunes of the maritime zone," and these dunes contained approximately 800,000 cubic meters of sand. As a result of a sharp increase in construction activity in Puerto Rico there was a greatly increased demand for sand, and by 1967 the dunes on Mr. Cordero's



*Appendix A.*

land became very valuable commercially. In 1970 he sold the land to the plaintiff Cordeco, a corporation established and controlled by his family for the purpose of mining sand. On June 10 of that year plaintiff petitioned the Department of Public Works[1] for the requisite permit to extract sand. No action was taken on plaintiff's petition despite the fact that Section 3.6 of the Regulations of the Public Works Department required that action be taken on such petitions within 60 days. Plaintiff's petition was initially referred to defendant Mercado, an official in the department, who did not act upon it; after numerous protestations by plaintiff, Mercado referred Cordeco's counsel to defendant Acevedo, the department's legal advisor. Acevedo "denied that plaintiff owned the land" in question, but took no definitive steps to resolve the matter. In the meantime, permits to extract sand had been granted to members of the Abreu family, the owners of the five tracts of land which surrounded plaintiff's parcel.[2]

In December, 1973 Cruz Matos, then Secretary of the Department of Natural Resources of the Commonwealth, issued a permit to the plaintiff for extracting sand; however, the terms of this permit excluded the area of land containing most of the sand dunes on plaintiff's property. The permit was granted in this form pursuant to the rec-

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[1] In January, 1973 the Department of Public Works was abolished and its powers and functions transferred to the newly created Department of Natural Resources. 3 L.P.R.A. §§ 152, 156 (1974). This change had no substantive effect on any aspect of the present case.

[2] In 1970 the members of the Abreu family, who owned the five other tracts of land, filed suit against Cordeco to determine the boundaries of the land conveyed to it by Carlos Cordero. They alleged the original deed to Mr. Cordero did not include the sand dunes. The district court, on March 18, 1975, dismissed the complaint and held that Cordeco was the owner of the entire tract of land, including the dunes.

ommendations of the defendants Acevedo and Mercado.[3] Defendant Negron Ramos became Secretary of the Department of Natural Resources in August, 1974 but took no action on Cordeco's petition for a sand extraction permit because the one issued in December, 1973 by his predecessor was still in force and no new application had been received.

Cordeco's contention at trial was essentially that the failure of the defendants to act on its sand excavation application and the subsequent issuance of a useless permit were the product of political pressure exerted by the powerful Abreu family (whose members owned the five surrounding tracts of land) and that by responding to such pressure the defendants denied plaintiff equal protection of the laws in violation of the fourteenth amendment of the United States Constitution. The advisory jury found that each of the four defendants acting singly sought to deprive plaintiff of its right to equal protection by denying the requested permit to extract sand. However, the jury found that only defendants Acevedo and Mercado acted beyond the limits of their lawful authority or discretion.[4] On the issue of damages the advisory jury held Cordeco was entitled to $500,000 in actual damages and $250,000 in punitive damages. The jury also responded affirmatively

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[3] The district court noted that Cruz Matos was originally named as a defendant but was dismissed without objection at the beginning of trial when the evidence revealed that he thought that the permit granted to Cordeco included the sand dunes in question.

[4] In an inconsistency noted by the district court the jury also found defendant Negron Ramos had conspired with Acevedo and Mercado to deprive Cordeco of its constitutional rights to equal protection. The court did not agree with the jury's finding with respect to the liability of Negron Ramos. *See* discussion *infra; Wilson* v. *Prasse,* 463 F.2d 109, 116 (3d Cir. 1972); *Mallory* v. *Citizens Utilities Co.,* 342 F.2d 796, 797 (2d Cir. 1965).



to the question of whether plaintiff was entitled to a permit to extract sand. The court's opinion and judgment followed.

Initially we examine the liability of defendants Santiago Vasquez and Negron Ramos. The district court agreed with the advisory jury that these defendants were acting within the limits of their lawful authority in respect to Cordeco's application for a sand extraction permit, and plaintiff has appealed from that aspect of its judgment. We find no error. Defendant Vasquez, as Secretary of the Department of Public Works of Puerto Rico from 1969 to 1973, was empowered to act upon requests for said extraction permits. However, defendant Acevedo, the department's legal advisor, was responsible for the analysis of such petitions from a legal perspective and defendant Mercado was responsible for technical analysis *inter alia.* There is ample evidence to show that for all essential purposes Acevedo and Mercado were the parties in position to control the granting or denial of permits and that, with respect to plaintiff's application, all actions taken were in response to the recommendations of Acevedo and Mercado. When defendant Negron Ramos became Secretary of the Department of Natural Resources in August, 1974 this earlier permit was still in force and Cordeco had not filed a new petition for sand extraction; accordingly Negron Ramos did not have occasion to grant or deny plaintiff's permit application.

As the evidence supports the conclusion that defendants Vasquez and Negron Ramos acted within the bounds of their lawful authority and discretion, the district court properly ruled that they enjoy a qualified immunity as a matter of law and are not subject to liability for their actions with respect to Cordeco's sand extraction permit. *Scheuer* v. *Rhodes,* 416 U.S. 232, 247-48 (1974); *see Wood* v. *Strickland,* 420 U.S. 308 (1975).

*Appendix A.*

With regard to the liability of defendants Mercado and Acevedo, the district court agreed with the advisory jury that these two defendants were not acting within the scope of their lawful discretion or authority in refusing to process Cordeco's application. The court characterized the failure of these two defendants to act on Cordeco's application as "based on illegitimate political considerations," and found them both to have acted "wantonly and with actual malice." The evidence at trial fully supported the inference that the failure of these two defendants to act on Cordeco's permit requests stemmed from improper considerations, viz. the fact that plaintiff's application was opposed by the politically influential Abreu family which owned the five adjacent parcels and Mr. Cordero's own lack of political influence. On appeal, Acevedo and Mercado insist that they acted properly in delaying action on plaintiff's permit request and in recommending the grant of a sand extraction permit not covering the dunes on Cordeco's land because there were inconsistencies in the deeds related to the original subdivision of the Abreu land into six parcels. They point out that the undivided original farm land had an acreage of 179 "cuerdas" whereas the deeds for the six constituent parcels amounted to only about 125 "cuerdas" and that the difference in acreage was possibly due to the exclusion from the deeds of the dunes "in the maritime zone." The two defendants claim that these differences and inconsistencies, together with the fact that a former owner of plaintiff's parcel had given notice of a dispute over title, created "legitimate doubt" about plaintiff's application for the sand permit which they were required by their positions to investigate with care. However, the district court found that although plaintiff's title to the sand dunes was not totally beyond doubt, defendants Mercado and Acevedo did not fairly raise and present this issue as a basis for not acting on plaintiff's application. Had they done so, the question



*Appendix A.*

of the title which was eventually resolved in plaintiff's favor, *see* n.2 *supra,* could have been resolved at an earlier stage and a permit either granted or denied. We think there was ample evidence to justify the court's conclusion that Acevedo and Mercado acted maliciously and wantonly, and with illegitimate "political" or, at least, personal motives, in holding up and seeking to defeat the granting of a license. Accordingly, we affirm the district court's ruling that defendants Acevedo and Mercado, both of whom it found to be acting under color of their official authority, had denied Cordeco's constitutional right to equal protection of the laws and were liable to plaintiff under 42 U.S.C. § 1983.[5]

We next examine the issue of damages. The advisory jury awarded plaintiff $500,000 compensatory damages for losses sustained from the withholding of the permit to

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[5] Although the majority of the court takes no position on this issue, Judge Campbell would make the following observation: Defendants expressly endorsed the district court's jury instructions setting forth its theory of the law with respect to the application here of § 1983 and the fourteenth amendment; and they do not on appeal challenge the legal and constitutional standards that were applied in this case. Therefore, without deciding the issue, the correctness of such standards can be assumed. *Cf. Morris* v. *Travisono,* 528 F.2d 856 (1st Cir. 1976). The second circuit held thirty years ago in *Burt* v. *City of New York,* 156 F.2d 791 (1946) that official misconduct like that found here, even though not the systematic, class-based discrimination usually associated with equal protection violations, fell within the "purposeful discrimination" standard announced several years earlier in *Snowden* v. *Hughes,* 321 U.S. 1 (1944). *See also McFarland* v. *American Sugar Refining Co.,* 241 U.S. 79 (1916); *Harrison* v. *Brooks,* 446 F.2d 404 (1st Cir. 1971); *McGuire* v. *Sadler,* 337 F.2d 902 (5th Cir. 1964); *Everlasting Development Corp.* v. *Luis Descartes,* 192 F.2d 1 (1st Cir. 1951) (Magruder, J.). *But cf. Simmons* v. *Jones,* 478 F.2d 321 (5th Cir. 1973). But the paucity of cases in the years since *Snowden* and *Burt* equating equal protection violations with instances of bribery and conflict of interest by state officials suggests that the matter may not, even yet, be finally settled.

excavate sand.[6] The court disregarded this finding and awarded only nominal damages in the sum of one dollar to the corporation on the ground that Cordeco had not actually suffered an economic loss. The court pointed to the uncontradicted evidence presented at trial indicating that in 1970, at the time of plaintiff's application, sand was selling in Puerto Rico for $1.00 per cubic meter and that by 1975 the price had risen to $2.00 per cubic meter.[7] The court held that "the sharp increase in [the] value [of sand] between 1970 and 1975 belies the conclusion that plaintiff was completely deprived of an extremely valuable asset,"[8] and that allowing the jury award "would entail double

[6] In its interrogatories the court requested the advisory jury to "State the amount of actual damages, if any, sustained by the plaintiff as a result of having been deprived of a permit to excavate its sand. And this is talking about actual compensatory damages. . . ." The court defined compensatory damages as "compensation for actual losses or damages sustained by the plaintiff by being deprived of the sand permit."

[7] The testimony of plaintiff's expert Maldonado indicated that the price of sand per cubic meter in each of the relevant years was as follows:

| | |
|---|---|
| 1970 | $1.00 |
| 1971 | 1.25 |
| 1972 | 1.50 |
| 1973 | 2.00 |
| 1974-75 | 2.00 |

[8] The court also rejected plaintiff's contentions that the increase in commercial value of sand should not be considered in fixing compensatory damages and that the jury award should be sustained on the basis of a simple rate of return on the land during the period in which plaintiff was deprived of its commercial use. Whatever the appropriateness of this measure of damages in cases involving complete deprivation of use of land, we do not think this theory apposite to this case where the plaintiff has remained in possession but has been denied the right, for a period of time, only to deplete an asset of the land. Under such circumstances, the application of a rate of return to total valuation does not seem either realistic or appropriate.



recovery in this case since the sand remains on the land. . . ."

Plaintiff claims it is nevertheless entitled to a damage recovery because there has been a decrease in major construction and a substantial decline in marketability of sand which makes it much more difficult to sell the commodity in 1974 and 1975 than had been earlier.[9] The district court concluded, however, that despite the great difficulty of selling sand, plaintiff had not suffered any loss because of the increased value of the sand in 1975. The court also ruled that even if plaintiff had suffered an actual present loss, "the amount has not been proven." After careful examination of the entire record we are compelled to agree.

Plaintiff's theory of damages in this case is essentially analogous to that based on a claim of tortious interference with business relations. In the instant situation such a

[9] Plaintiff's evidence in this regard consisted essentially of the testimony of its expert Maldonado, a licensed civil engineer. On direct examination he stated in pertinent part as follows:

"Q. With respect to the need for sand, we heard some people say that there was a construction boom in Puerto Rico. What happened to the construction boom now?
A. [Maldonado] It has decreased. . . .
Q. How does that reflect on the salability of sand?
A. Well, . . . it has diminished.
Q. Is sand as easy to sell today as it was let us say in 1970, '71 and '72?
A. No, it is not as easy to sell it now [in 1975] as it was in 1970.
. . . .
Without a doubt construction has diminished."

Cross-examination produced testimony in a similar vein:

"Q. Do you know in your experience as a civil engineer whether in Puerto Rico in general there is a shortage or an excess of sand for sale?
A. [Maldonado] One cannot make sure as to the fact if there is an excess or if there is a lack of it but what we can assure is that the buying of sand has diminished due to the fact that construction also has diminished. . . ."

theory would require evidence in the nature of loss of profits from sales of the sand, which of course would be offset by the value of the remaining asset. Here, inasmuch as evidence indicates a doubling in the selling price of sand over the relevant time period, *see* n.7 *supra,* plaintiff, to prove the fact of damage, must show that the decline in marketability of the sand decreased its "real" value as an asset below the ostensible selling price; otherwise the value of the remaining sand would more than compensate for plaintiff's alleged lost profits. A party's financial loss is the ultimate measure of his damage, *PSG Co.* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 417 F.2d 659, 663 (9th Cir. 1969, *cert. denied,* 397 U.S. 918 (1970), and the purpose of a damage award is to compensate the injured party for loss resulting from the conduct of the wrongdoer, "not to penalize the wrongdoer or to allow plaintiff to recover a windfall." *Farmers and Bankers Life Insurance Co.* v. *St. Regis Paper Co.,* 456 F.2d 347, 351 (5th Cir. 1972). *See Big Rock Mountain Corp.* v. *Stearns-Roger Corp.,* 388 F.2d 165, 169 (8th Cir. 1968). However, plaintiff has failed to make the requisite showing.

Although it introduced evidence to the effect that the marketability of sand had decreased, this evidence was of a very general nature, *see* n.9 *supra,* and provided no clear basis for calculating the extent to which the market decline had reduced the present value of the remaining sand as reflected in the current selling price. In sum, we do not find in the record a sufficient basis for drawing a reasoned conclusion that the deprivation of profits overbalanced the substantial increment in value of the remaining sand. And with respect to the amount of damages, while a plaintiff need not demonstrate the amount of damage with mathematical precision, *see Burns Bros. Plumbers, Inc.* v. *Groves Ventures Co.,* 412 F.2d 202, 209 (6th Cir. 1969); *DeVries* v. *Starr,* 393 F.2d 9, 18 (10th Cir. 1968), it must provide sufficient evidence to take the amount of damages out of the realm of speculation and conjecture. *Locklin* v. *Day-Glo Color Corp.,* 429 F.2d 873, 879 (7th Cir. 1970), *cert. denied,* 400 U.S. 1020 (1971); *see Tri-State Produce Co.* v. *Chicago B. & Q. R. Co.,* 104 F.Supp. 452, 463 (N.D. Iowa 1952); *cf. Bigelow* v. *RKO Radio Pictures,* 327 U.S. 251, 264 (1946). As the district court properly found, plaintiff has here failed to meet that burden.



The district court awarded attorney's fees to the successful plaintiff in this action stating: "[t]he denial of plaintiff's constitutional right of equal treatment under the laws was intentional and malicious. . . . [H]ad it not been for the callous disregard of plaintiff's rights . . . the costly, protracted court proceedings in this case would not have been necessary." It found that the award was not for punitive purposes, but was an attempt to arrive at substantial justice and to assure that the courts will remain open to those persons seeking to vindicate their constitutional rights. At common law attorney's fees are not compensable damages, *Aracambel* v. *Wiseman,* 3 U.S. (3 Dall.) 306 (1796), nor are they the appropriate measure of punitive damages. *Day* v. *Woodworth,* 54 U.S. (13 How.), 363, 371 (1851). Support for the district court's award of attorney's fees, then, can only be found, in the absence of an applicable statute, in the traditional equitable power to award fees when the losing party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . . ." *Alyeska Pipeline Co.* v. *Wilderness Society,* 421 U.S. 240, 258-59 (1975).

Under recent formulations of the "bad faith" exception to the American rule, attorney's fees may be awarded for bad faith or oppressive conduct in the events giving rise to litigation. *Newman* v. *Alabama,* 522 F.2d 71, 80 (5th Cir. 1975); *Stolberg* v. *Members of Board of Trustees,* 474 F.2d 485, 490-91 (2d Cir. 1973); *McEnteggart* v. *Cataldo,* 451

F.2d 1109, 1112 (1st Cir. 1971); *Bell* v. *School Board,* 321 F.2d 494 (4th Cir. 1963). Part of the underlying rationale of this exception is to shift the burden of expense in resorting to the courts to vindicate constitutional rights purposefully denied. This interpretation of the "bad faith" exception appears to us, however, both a departure from the traditional concept which authorized an award of fees for bad faith in bringing suit or in the course of litigation,[10] and a significant policy decision concerning access to the courts. Accordingly, we question whether the imposition

[10] *In re Boston & Providence R.R.,* 501 F.2d 545, 549 (1st Cir. 1974) (bringing vexatious action); *In re Swartz,* 130 F.2d 229, 231 (7th Cir. 1942) (abusive motions in bankruptcy proceeding); *Buchalter* v. *Rude,* 54 F.2d 834, (10th Cir. 1932) (claim conceived in bad faith); *see Parker Rust Proof Co.* v. *Ford Motor Co.,* 23 F.2d 502 (E.D. Mich. 1928) (extraordinary expenses of action, not specified to include fees, awarded due to unreasonable defense positions). *See generally* Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts,* 122 U. Pa. Rev. 636, 660 (1974). *But see Rolax* v. *Atlantic Coast L. R.R.,* 186 F.2d 473 (4th Cir. 1951).

The Supreme Court has not definitively ruled upon the content of the traditional "judicially fashioned" exception based upon bad faith or oppressive conduct. In the single case in which it purported to approve an award of attorney's fees under this exception, *Vaughn* v. *Atkinson,* 369 U.S. 527, 539-41 (1962), the defendant acted wrongfully in the events leading to the lawsuit. But *Vaughn* was subsequently read, *Fleischmann Corp.* v. *Maier Brewing Co.,* 386 U.S. 714, 718 (1967), as a case affirming attorney's fees as compensable damages under traditional admiralty practice. *See The Appollan,* 22 U.S. (9 *Wheat.*) 362, 379 (1824). *See also Robinson* v. *Pocahantas, Inc.,* 477 F.2d 1048, 1051 (1st Cir. 1973); G. Gilmore & C. Black, The Law of Admiralty 313 (2d ed. 1975). The remaining Supreme Court comment is incomplete and inconsistent. In a footnote to *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402 n. 4 (1968) (per curiam), the Court describes the exception as if it applied only to wrongful conduct during the pendency of a lawsuit. In a passing reference in *Hall* v. *Cole,* 412 U.S. 1, 15 (1972), Mr. Justice Brennan suggests that attorney's fees may be awarded for bad faith either in the actions that led to the lawsuit, or in the conduct of litigation.



of fee awards for wrongful conduct in the events leading to suit can be reconciled with the rationale of *Alyeska, supra.*[11]

We do not need to resolve this question here. Whatever the parameters of the "bad faith" exception, fees should be awarded under its authority only in extraordinary circumstances and for dominating reasons of justice. *Fleischmann Corp.* v. *Maier Brewing Co.,* 386 U.S. 714, 718 (1967); 6 J. Moore, Federal Practice ¶ 54.77[2] at 1709-11 (2d ed. 1971). To the extent that the district court premised the award of fees on the nature of defendants' acts giving rise to the lawsuit, the circumstances of the present case make such an award inappropriate. Plaintiff sought compensatory and punitive damages, as well as equitable relief in the district court. It was awarded punitive damages in the amount of $15,000 against two defendants. Traditionally, punitive damages have been considered a more precise measure of a defendant's wrongful conduct than an award of fees, *Vaughn* v. *Atkinson,* 369 U.S. 527, 540 (1962) (Stewart, J., dissenting); *Day* v. *Woodworth, supra,* at 371, and to the extent that an award of fees under the "bad faith" exception is punitive, *Hall* v. *Cole,* 412 U.S. 1, 5 (1972), the district court's award of both fees and punitive damages for conduct giving rise to the lawsuit constitutes double punishment for such action.[12] Therefore,

[11] Under *Alyeska,* it is the province of Congress to control changes to the American Rule requiring each party to bear its own attorney's fees. Subject to the traditional "judicially fashioned exceptions", to which Congress is deemed to have acquiesced, 421 U.S. at 260, federal courts are not free to award fees to litigants except under the authority of a statute. If, as we suggest in the text, an award of fees for bad faith on the part of the defendants in the events leading to a lawsuit is a significant departure from the traditional exception, Congress could not be deemed to have agreed, by long forbearance, to their imposition.

[12] We explicitly reserve decision as to whether the award of attorneys' fees under the "bad faith" exception would be appropriate in the absence of an award of punitive damages.

we set aside the district court's award of fees, and remand for consideration of defendants' conduct during the pendency of the lawsuit.[13]

*Remanded for proceedings in accordance herewith.*

[13] Without expressing any substantive view as to the nature of defendants' conduct while the lawsuit was pending, we note that approximately four years elapsed from the time plaintiff commenced suit in October, 1971 (*see* Fed. R. Civ. P. 3), until the date the district court issued its decision, and that during this period plaintiff continued to be denied an extraction permit.



## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CIVIL NO. 803-71

ORDER

CORDECO DEVELOPMENT CORPORATION
PLAINTIFF

*vs.*

ANTONIO SANTIAGO VAZQUEZ, et al.
DEFENDANTS

In accordance with the opinion entered this day in the above styled case it is ADJUDGED and ORDERED:

(1) that plaintiff Cordeco Development Corporation have and recover from defendants Zenon Mercado Mercado and Inez Acevedo, in their individual capacities the sum of one dollar as nominal damages;

(2) that plaintiff Cordeco Development Corporation have and recover from defendant Zenon Mercado Mercado, in his individual capacity, the sum of five thousand dollars as punitive damages with interest thereon from this date and that execution may issue according to law;

(3) that plaintiff Cordeco Development Corporation have and recover from defendant Inez Acevedo, in her individual capacity, the sum of fifteen thousand dollars as punitive damages with interest thereon from this date and that execution may issue according to law;

(4) that plaintiff Cordeco Development Corporation's claims for compensatory and punitive damages

against defendants Pedro Negron Ramos and Antonio Santiago Vazquez are denied and dismissed;

(5) that Pedro Negron Ramos, in his representative capacity as the Secretary of the Department of Natural Resources, forthwith grant a sand extraction permit authorizing Cordeco Development Corporation to extract sand from the tract of land which it acquired by deed dated June 9, 1970 from Carlos B. Cordero and which by order of this court dated March 18, 1975 was determined to be bounded on the North by the Terrestrial Maritime Zone; and

(6) attorney's fees in the amount of forty thousand dollars are hereby awarded in favor of plaintiff Cordeco Development Corporation and against the defendants Zenon Mercado Mercado and Inez Acevedo jointly and severally in the amount of forty thousand dollars with interest thereon from this date and that execution may issue according to law.

ENTER: This 22nd day of October, 1975.

James C. Turk, Chief Judge
U. S. District Court
Western District of Virginia
sitting by designation



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil NO. 803-71

CORDECO DEVELOPMENT CORPORATION
PLAINTIFF

*vs.*

ANTONIO SANTIAGO VAZQUEZ, et al.
DEFENDANTS

# OPINION

By: James C. Turk, Chief
U. S. District Judge
for the Western District
of Virginia, sitting by
designation

This is a suit for damages and injunctive relief filed by Cordeco Development Corporation against four officers of the Commonwealth of Puerto Rico based on alleged violations of plaintiff's constitutional rights. The case was heard by this court beginning on May 7, 1975. Neither side requested a jury, and the court on its own motion pursuant to *Fed. R. Civ. P.* empannelled an advisory jury. This jury rendered a verdict on May 14, 1975 in the form of answers to special interrogatories submitted by the court. The parties thereafter filed post-trial motions and briefs. The court has now reached the following findings of fact and conclusions of law.

Briefly stated, the background facts of this case are as follows. Mr. Carlos Cordero purchased a tract of land from Mrs. Antonia Abreu Diaz by deed dated December 30, 1956. This parcel of land was part of a larger tract which

had been subdivided in 1949 into six tracts of approximately equal value. Mr. Cordero paid $6400 for this parcel of land and used it as a farm in the years following the purchase. The northern boundary of this parcel of land was described as the "dunes of the maritime zone", and these dunes contained some 800,000 meters of sand. In 1967 sand became commercially valuable in Puerto Rico as a result of a sharp increase in construction, and hence the sand dunes which Mr. Cordero believed to be on his land became extremely valuable. In 1970 Mr. Cordero sold the land to the plaintiff, a corporation established and controlled by his family for the purpose of mining the sand.

On June 10, 1970 plaintiff filed a petition with the Department of Public Works for a permit to extract sand. At that time defendant Santiago Vazquez was the Secretary of the Department of Public Works and as such had the authority to act on such petitions; defendant Mercado was an official in that department responsible for analyzing and recommending action on such petitions; and defendant Acevedo was the legal advisor to the department. Despite the fact that Section 3.6 of the Regulations of the Public Works Department required that action be taken on such petitions within 60 days, no action was taken. Plaintiff's petition was initially referred to Mr. Mercado, who did not act on it, but in eventual response to plaintiff's protestations referred plaintiff's counsel to Miss Acevedo. Miss Acevedo denied that plaintiff owned the land, but took no definitive action to resolve the matter. In the meantime sand extraction permits had been granted to the Abreu family, the owners of the other five tracts of land which had been subdivided at the same time as plaintiff's parcel.

In 1970 the members of the Abreu family who owned the other tracts of land filed suit to determine the boundaries of the land conveyed to Mr. Carlos Cordero. In this suit



the plaintiffs alleged that the conveyance to Mr. Cordero did not include the sand dunes. This case came to be heard in this court by the Honorable Robert Grant, who on March 18, 1975 dismissed the complaint and held that Cordeco Development Corporation was the owner of the entire tract of land.

In December 1973 Mr. Cruz Matos, the then Secretary of the Department of Natural Resources, issued a permit to the plaintiff to extract sand; however this permit by its terms excluded the area of land containing most of the sand dunes.[1] This petition was granted in this manner pursuant to the recommendations of the defendants Acevedo and Mercado. Defendant Negron Ramos became Secretary of the Department of Natural Resources in August of 1974. He took no action on plaintiff's petition for a sand extraction permit because a permit had been issued in December, 1973 by his predecessor and no further application had been received.

The plaintiff's contention in this suit is essentially that the defendants' failure to act on its sand excavation application and the subsequent issuance of a useless permit were the result of political pressure exerted by the powerful Abreu family, and that by responding to such pressure the defendants denied plaintiff equal protection of the laws. With respect to the issue of liability of the four defendants the answers of the advisory jury to the special interrogatories were not wholly consistent. The jury found as follows: (1) that each of the four defendants, acting singularly, sought to deprive plaintiff of its right to equal protection of the laws by denying it permission to extract sand; (2) that defendants Acevedo, Negron Ramos,

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[1] Mr. Cruz Matos was originally named as a defendant but was dismissed at the beginning of the trial without objection from either side. The evidence revealed that Mr. Matos thought that the permit granted to plaintiff included the sand dunes in question.

and Mercado conspired to deprive plaintiff of its constitutional right to equal protection of the laws; but (3) that only defendants Acevedo and Mercado acted outside the bounds of their lawful authority or discretion. The advisory jury further held that plaintiff was entitled to $500,000 in actual damages and that defendant Acevedo and Mercado were liable to plaintiff for $250,000 in punitive damages. The jury voluntarily assessed the punitive damages in the proportion of 75% against defendant Acevedo and 25% against defendant Mercado.[2] Finally, the jury responded affirmatively to the question of whether plaintiff was entitled to a permit to extract sand.

The court finds from the evidence that the action, or lack of action, taken by the defendants Santiago Vazquez and Negron Ramos with respect to plaintiff's application for a permit to extract sand were in response to the recommendations of the other defendants who were the parties in the position to control the granting or denial of the permit. The court therefore agrees with the advisory jury that Messrs. Santiago Vazquez and Negron Ramos were acting within the limits of their lawful authority or discretion. As such, defendants Santiago Vazquez and Negron Ramos, as a matter of law enjoy qualified immunity and are not subject to liability for their roles in failing to act on plaintiff's application. *See Scheuer* v. *Rhodes,* 416 U.S. 232 (1974); *Wood* v. *Strickland,* 420 U.S. 308 (1975).

The court further agrees with the advisory jury that defendants Mercado and Acevedo were not acting within the

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[2] The advisory jury in addition wrote on the verdict form that in their mind the percentage of guilt of each defendant was as follows:

Inez Acevedo 60%
Zenon Mercado 25%
Pedro Negron Ramos 10%
Antonio Santiago Vazquez 5%



bounds of their lawful authority or discretion in refusing to process plaintiff's application. The evidence strongly supported the inference that these defendants' failure to act on plaintiff's application was the result of political considerations, specifically Mr. Cordero's lack of political influence and the fact that plaintiff's application was opposed by the politically influential Abreu family. Although plaintiff's title to the sand dunes was not above suspicion, defendants Mercado and Acevedo did not fairly raise and present this issue as a basis for not acting on plaintiff's application. Had this been done the question of title which was eventually resolved in plaintiff's favor could have been resolved at an early stage and a permit either granted or denied. The court finds that the question of plaintiff's title to the sand dunes was subsequently raised by defendants Acevedo and Mercado as a vehicle for excusing the dilatory and unjustifiable refusal to deal fairly with plaintiff within the limits of the law; and that the refusal to act on plaintiff's petition as presented was based on illegitimate political considerations which had the effect of denying plaintiff equal protection of the laws. The court further finds that the efforts by defendants Acevedo and Mercado to deny plaintiff equal protection of the laws were undertaken singularly and in concert pursuant to and under color of their authority as officials of the Commonwealth of Puerto Rico. It is therefore the courts conclusion of law that these defendants are jointly and severally liable to plaintiff pursuant to the provisions of 42 U.S.C. § 1983.

It is with respect to the extent of damages to which the plaintiff is entitled that the court must disagree to a substantial extent with the conclusions of the advisory jury.

The uncontradicted evidence presented at trial revealed that in 1970, at the time of plaintiff's application, sand was selling in Puerto Rico for $1.00 per meter and by 1975 it was selling for $2.00 per meter. The evidence also indi-

cated that it was more difficult to market sand in 1975 because of a decline in construction activity. Nevertheless, the approximately 800,000 meters of sand on plaintiff's land have increased in value from $800,000 in 1970 to $1,600,000 today. And although the evidence was not refuted that it is more difficult to market the sand today, the sharp increase in its value between 1970 and 1975 belies the conclusion that plaintiff was completely deprived of an extremely valuable asset.

Plaintiff urges that the increase in commercial value of sand should not be considered in fixing compensatory damages and that the advisory jury's award of $500,000 should be sustained on the basis of a simple rate of return on the land during the period in which plaintiff was deprived of its commercial use. However, a compensatory award of $500,000 requires a simple rate of return of approximately 12% on $800,000 during the period in question and ignores the expenses involved in mining the sand. But more fundamentally, such a theory of calculating compensatory damages would entail double recovery in this case since the sand remains on the land and can be marketed by the plaintiff at a substantially increased price. In view of these circumstances the court does not believe that compensatory damages can be based on a rate of return on the value of the land from 1970 until the present. Nor does the court believe that the compensatory damages awarded by the advisory jury can be sustained on any other theory. The inconvenience and delay occasioned by the defendants' unequal application of the laws was no doubt great, however in view of plaintiff's corporate status such suffering cannot be compensated as in a case with individual plaintiffs. For these reasons the court has concluded that nominal damages of one dollar are all that can be legally justified. As stated in 22 *Am. Jur.* 2d *Damages* § 5 (1965):

> Nominal damages are either those damages recoverable where a legal right is to be vindicated against an invasion that has produced no actual present loss of any kind or where, from the nature of the case, some compensable injury has been shown but the amount of that injury has not been proved.



The court doubts that plaintiff has suffered an actual present loss in this case and, in any event if it has the amount has not been proven.

On the other hand the court agrees with the advisory jury that defendants Acevedo and Mercado acted wantonly and with actual malice in failing to process plaintiff's application for a permit and in depriving it of the use of its land. However, as in the case of the compensatory award, from the evidence the court cannot sanction the award of $250,000 in punitive damages. Such an award is not commensurate with the defendants' culpability, and in the court's opinion reflects passion and prejudice on the part of the advisory jury toward the defendants. The court has accordingly made an independent assessment of the punitive damages. Based on the evidence presented the court has concluded, as did the advisory jury, that defendant Acevedo was primarily responsible for the denial of plaintiffs' constitutional rights to equal protection of the laws and defendant Mercado responsible to a somewhat lesser extent. The court is of the opinion that punitive damages in the amount of $15,000 against defendant Acevedo and $5000 against defendant Mercado fairly reflects their culpability and would justly punish them and deter others from similar abuses. Judgment for such amounts will therefore be entered.

Finally, the evidence indicates that the plaintiff has satisfied the legal requirements for the issuance of a permit to extract sand from the sand dunes in question and further delay in granting such a permit is unwarranted. Accordingly plaintiff's prayer for prospective injunctive

relief against defendant Negron Ramos, the present Secretary of the Department of Natural Resources, will be granted.

Plaintiff has also filed a motion requesting the assessment of attorney fees against the defendants. Consideration of this motion begins with the recent case of *Alyeska Pipeline Service Co.* v. *The Wilderness Society,* 421 U. S. 240 (1975), in which the Supreme Court stated the general rule that attorney's fees were not recoverable in federal cases in the absence of a statute specifically authorizing such awards. However, the Court recognized two exceptions to this rule, to wit: when litigation produces a common fund for the benefit of others or "when the losing party has 'acted in bad faith, vexatiously, wantonly or for oppressive reasons . . . *F. D. Rich Co.,* 417 U. S., at 129 (citing Vaughn v. Atkinson, 369 U. S. 527 (1962))' . . ." 421 U. S. at 258-259. It is this second exception which the court believes to be manifestly applicable to the present case.

The denial of plaintiff's constitutional right to equal treatment under the laws was intentional and malicious in this case. The plaintiff has been put to an inordinate expense and delay in order to obtain a permit to extract sand from his land, and it is clear that had it not been for the callous disregard of plaintiff's rights by defendants Acevedo and Mercado, the costly, protracted court proceedings in this case would not have been necessary. Had defendants Mercado and Acevedo acted forthrightly and in good faith with plaintiff the question of its entitlement to a permit could have been resolved administratively, or at most with a single court proceeding in which title to the land was tried. In these circumstances, the court has no hesitation in exercising its inherent power to award reasonable attorney fees to the plaintiff. See *McEnteggart* v. *Cataldo,* 451 F 2d 1109 (1st Cir. 1971).



Such an award in this case is not further punishment, but simply the court's attempt to arrive at substantial justice and assure that as a practical matter the courts will remain open to those persons seeking to vindicate their constitutional rights in the face of intentional disregard of such rights by government officials. Nevertheless the court believes that the burden of such an award must be placed on defendants Acevedo and Mercado who are the parties who acted wantonly and oppressively and who in fact forced plaintiff to undertake this litigation. Although considerably less than requested, the court believes that an award of $40,000 in attorney's fees jointly and severally against defendants Mercado and Acevedo is just in this case. Judgment for such an amount will be entered.

DATED: This 22nd day of October, 1975.

James C. Turk, Chief Judge
U. S. District Court
Western District of Virginia
sitting by designation

# APPENDIX C

## Statutes Cited.

**42 U.S.C. § 1983. Civil Action for Deprivation of Rights.**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

**42 U.S.C. § 1985. Conspiracy to Interfere With Civil Rights.**

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exer-





cising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

**Section 3.6, Regulations of the Department of Public Works (28 R&R PR 220-3 (f))—Regulation of Extraction of Materials from the Earth's Cortex (Petition For Permits)**

(f) Within 60 days following the filing of the petition for permit, the Secretary will resolve the same, and when duly justified, he can grant a provisional permit conforming to just terms and conditions until the time he resolves the petition on its merits.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-329

CORDECO DEVELOPMENT CORPORATION,
*Petitioner,*

v.

ANTONIO SANTIAGO VÁZQUEZ, INES ACEVEDO, as Sub-Secretary of the Department of Natural Resources of the Commonwealth of Puerto Rico, and Individually; LENON MERCADO MERCADO, as an Officer of the Department of Natural Resources, and Individually; and PEDRO NEGRÓN RAMOS, individually and in his capacity as the Secretary of the Department of Natural Resources,
*Respondents.*

**On Appeal from a Judgment of the United States District Court for the District of Puerto Rico**

## OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

ROBERTO ARMSTRONG, JR.
*Acting Solicitor General*

RONALDO RODRIGUEZ OSSORIO
*Assistant Solicitor General*

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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**On Appeal from a Judgment of the United States District Court for the District of Puerto Rico**

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## OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Respondents Antonio Santiago Vázquez and Pedro Negrón Ramos pray that the Writ of Certiorari requested in the above-captioned case be denied.

## COUNTER-STATEMENT OF FACTS

The relevant facts of this case have been set forth in detail in the Opinions of the United States District Court for the District of Puerto Rico, Civil No. 803-71[1] and of the United States Court of Appeals for the First Circuit, No. 75-1424,[2] and in order to avoid repetition we adopt them herein.

Nevertheless, the Statement of the Case as presented in the Petition for Writ of Certiorari is at times imprecise, incomplete, or both, for which reason we wish to clarify some points which were highly relevant in the resolution of the case below.

In 1949, the Abreu family owned an undivided piece of land in Isabela, Puerto Rico, which consisted of 179 "cuerdas".[3] According to the description of the property, as it appears from the deed and a certification of the Registry of Property—both presented as evidence at trial—its northern boundary was the "maritime zone". In 1949, the Abreu family decided to divide said tract of land among the heirs and, for that purpose engaged the services of a notary public, who prepared the corresponding deed of segregation,[4] and the property was divided into six parcels of land totalling approximately 125 "cuerdas"; that is, less than the total acreage of the original piece of land. In said deed, although the notary public described the newly created six separate parcels of land, he did not include a de-

[1] Appendix "B" of the Petition.

[2] Appendix "A" of the Petition.

[3] A "cuerda" is a measure of land consisting of 43,290 square feet, which is less than 1% smaller than an acre.

[4] It was admitted as evidence at the trial.



scription of the remnant, which consisted of the difference between the 179 "cuerdas" and the total of the six parcels of land with a total of 125 "cuerdas". Nevertheless, he stated in the deed that the difference in acreage was "in the dunes of the maritime zone". Contrary to the evidence submitted below, petitioners state that "In 1949, a local attorney divided the entire property among six (6) Abreu heirs, the value of six (6) equaling the value of the previously undivided whole".

When describing the six parcels of land, the North boundary of each parcel was changed from that of the original tract of land. That is, instead of stating that the North boundary was "the maritime zone" it was stated that the North boundary was "the dunes of the maritime zone".

In 1956, one of the Abreu heirs sold her parcel of land to Carlos D. Cordero for $6,400.00; the parcel was described as having 32 "cuerdas", and was inscribed for that amount in the Registry of Property.

In 1969, when sand became very valuable, the sons of Carlos D. Cordero organized a Panamanian Corporation by the name of Cordeco Development Corporation—the petitioner herein—which, through a public deed,[5] bought the parcel from Cordero. In said deed, the Corporation was represented by its president, Charles A. Cordero, the son of Carlos D. Cordero; the parcel of land was described the same way that it had been described in the deed by which it was created. Said deed contained an unilateral and gratuitous statement to the effect that even though the de-

[5] Plaintiff's Exhibit 7 before the U.S. District Court.

scription of the parcel stated that it consisted of about 32 "cuerdas", it really consisted of sixty-two; in other words, the farm grew suddenly and spontaneously to almost twice its size, according to petitioner's deed. The Registrar of Property rejected this clearly illegal contention and, pursuant to Puerto Rican law, registered only the original 32 "cuerdas".

The new owners, petitioners herein, did not exercise any of the actions prescribed by Puerto Rican law to inscribe this alleged excess in the area of the parcel. They merely, on the day after the signing of the deed, filed a petition with the Department of Public Works of Puerto Rico to extract sand. At that time, defendant Antonio Santiago Vázquez was the Secretary of said Department, one of the largest in the government of the Commonwealth of Puerto Rico; as such, he had the statutory right to act on such permits. Codefendant Zenón Mercado was an engineer in that Department, and he was responsible for analyzing petitions from a technical point of view, and recommending action. Codefendant Inéz Acevedo de Campos was the legal advisor to the Department, and had to evaluate petitions from the legal standpoint. After several meetings with Charles A. Cordero, Mrs. Acevedo de Campos stated that the permits could not be issued since Cordeco did not have legal title to the land from which the sand was to be extracted; she took no definite action to solve this matter. No evidence was presented to establish that Mr. Santiago Vázquez, the Secretary of a Department with over three thousand employees, had any knowledge of this.

The first court attempt to clarify Cordeco's title to the land was a lawsuit filed by members of the Abreu



family against petitioner.[6] On March 18, 1975 the District Court dismissed the complaint and held that Cordeco was the owner of the tract of land. It should be noted that as of January 1972, Mr. Santiago Vázquez was no longer Secretary of the Department of Public Works.

On December, 1973, Mr. Cruz A. Matos, the then Secretary of the Department of Natural Resources--which now had the responsibility for issuing sand extraction permits—issued petitioner a permit to extract sand. However, petitioner alleged that this permit excluded the area of land containing most of the sand dunes; this permit had been granted according to the recommendations of Acevedo and Mercado.

On August, 1974, codefendant Pedro Negrón Ramos was appointed Secretary of the Department of Natural Resources.[7] At this time, codefendants Mercado and Acevedo had responsibility for the sand extraction permits, from a technical and legal standpoint respectively. Mr. Negrón Ramos took no action on the petition for a sand extraction permit because according to the Department's files, a permit had already been issued and was still in force and there was no application for its amendment. Furthermore, a case was pending before the U.S. District Court, in which he was included as a defendant after he took office.

The evidence against Dr. Santiago Vázquez can be summarized as follows: he was Secretary of the Department of Public Works from 1969 to 1973 and was

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[6] *Bravo Abreu* v. *Cordeco Development Corp.*, 954-70, U.S.D.C.-P.R.

[7] The case was filed originally on October, 1971.

empowered to act upon requests for sand extraction permits. However, defendant Acevedo was responsible for the analysis of such petitions from a legal perspective and defendant Mercado was responsible for technical analysis. The U.S. Court of Appeals found that:

> "There is ample evidence to show that for all essential purposes Acevedo and Mercado were the parties in position to control the granting or denial of permits and that, with respect to plaintiff's application, all actions taken were in response to the recommendations of Acevedo and Mercado."

The evidence tendered against Mr. Negrón Ramos can be summarized in the words of the U.S. Court of Appeals:

> "When defendant Negrón Ramos became Secretary of the Department of Natural Resources in August, 1974 [the] earlier permit was still in force and Cordeco had not filed a new petition for sand extraction; accordingly Negrón Ramos did not have occasion to grant or deny plaintiff's permit application."

After the case was heard, the advisory jury empanelled by the District Court found that Messrs. Santiago Vázquez and Negrón Ramos were acting within the limits of their lawful authority or discretion. The U.S. District Court agreed with this finding of the advisory jury in its opinion, as did the U.S. Court of Appeals. It was ruled that they enjoy qualified immunity as a matter of law and are not subject to liability for their actions with respect to Cordeco's sand extraction permit.



## REASONS FOR DENYING THE WRIT

### I. The Decision Below Granting Immunity to Codefendants Antonio Santiago Vaquez and Pedro Negron Ramos Was Correct.

Petitioner's contention that the courts below erred in granting immunity to Messrs. Santiago Vázquez and Negrón Ramos lacks merit for two basic reasons: (a) lack of evidence and (b) the doctrine of qualified immunity.

It should be made clear that the "acts" to which petitioner refers are that codefendants herein did not solve the petition for sand extraction permits within the period of sixty days after they were filed. As we have seen, Mr. Negrón Ramos took no action on the sand extraction permit because according to the files of the Department of Natural Resources a sand extraction permit had been issued to Cordeco on December, 1973, by his predecessor Cruz A. Matos, and no further applications for a permit, or requests for the amendment of the existing one, had been submitted; in these circumstances, there was nothing before his consideration. Petitioner attempted to establish before the District Court that Mr. Negrón acted in bad faith because he did not act after he had been included as a defendant in the case at bar; this contention was rejected by the Court. It would be against the better interest of good government administration to have done so while there was a controversy pending before a court and while there was no administrative action pending. As to Mr. Santiago Vázquez, from a memorandum [8] dated November 3, 1971 it appears that, rely-

[8] Plaintiff's Exhibit 24.

ing on the advice of his legal counsel, codefendant Acevedo de Campos, he directed her to prepare a "reasoned order denying the permit . . ."

The District Court concluded from the evidence submitted that the action—or inaction—of Messrs. Santiago Vázquez and Negrón Ramos with respect to Cordeco's application for a permit to extract sand was in response to the recommendations of the other codefendants, who were the parties in a position to control the granting or the denial of such permits. Therefore, the District Court agreed with the advisory jury that Messrs. Santiago Vázquez and Negrón Ramos were acting within the limits of their lawful authority or discretion. As such, the District Court concluded and the Court of Appeals affirmed, they enjoy qualified immunity and are not subject to liability for their role in failing to act on Cordeco's application. In concluding so, the courts below relied primarily on this Court's decisions in the cases of *Scheuer* v. *Rhodes,* 416 U.S. 232 (1974), and *Wood* v. *Strickland,* 420 U.S. 308 (1975).

Public officials enjoy an absolute or qualified immunity, depending upon the nature of the office and the scope and discretion of responsibilities appertaining thereto. In *Scheuer* v. *Rhodes, supra,* this Court held that:

> "It is the existence of reasonable grounds for the belief formed at the time and in light of all circumstances, coupled with good faith belief that affords the basis for qualified immunity."



This official immunity, as stated in said case by this Court, rests on two mutually dependent rationales:

> "(1) The injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion, and;
>
> (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good."

Acts which are discretionary in nature when performed by a public official do clothe him with a governmental immunity of a limited nature. *Dewell* v. *Lawson,* 489 F.2d 877 (1974). The broadness of, and the nature of the functions and duties with which a public official is charged must be considered in determining whether an official privilege from liability applies, and consideration must be given to the proof supporting the defense of official privilege, i.e., lack of malice, intent, wilfulness, or bad faith, or conversely, a showing of good and proper cause for the act complained of. The determination of reasonable grounds and good faith which affords immunity to members of the executive branch must be based on the evidence presented by the parties; in the case at bar, the evidence clearly indicates that the conduct of Messrs. Santiago Vázquez and Negrón Ramos falls within this Court's immunity doctrine, and it was so recognized by the advisory jury when it concluded that they were acting within the limits of their lawful authority or discretion, and by the courts below in rejecting any claims against them.

It is inconceivable that, on the basis of the evidence introduced at the trial, as the courts below have summarized it, and considering this Court's doctrine, respondents herein could be held responsible for damages to petitioner.[9] Respondents herein acted as heads of large government departments and as such, in order to properly fulfill their duties, had to reach daily a large number of decisions of a varied and important nature; in order to be able to act at all they had to follow the usual procedure in these cases, that is, to delegate on subordinates part of their functions, particularly in those cases that required a complex and extensive amount of technical factual data and on which careful legal evaluations had to be made. For these reasons, respondents herein had to rely on the technical advice of an engineer who had made a field study of the land—in this case codefendant Mercado. Also, since neither is an attorney, they had to rely on the advice of the head of their legal section—in this case codefendant Acevedo de Campos. In this particular occasion the legal advisor informed respondents herein that Cordeco did not have a valid title to the dunes from where it had requested to extract sand, and that said dunes were probably the property of the Commonwealth of Puerto Rico; in these circumstances it would have been highly irresponsible—not to say illegal—for them to issue the permit requested by Cordeco.

Only through this reliance on the advice of specialized subordinates can high government officers adequately discharge their numerous responsibilities. As this

[9] See: *Franklin* v. *Meredith*, 386 F. 2d 958 (1967); *Dewell* v. *Lawson*, 489 F. 2d 877 (1974); *Klein* v. *New Castle Co.*, 370 F. Supp. 85 (1974); *O'Brien* v. *Galloway*, 362 F. Supp. 901 (1973).



Court stated in *Robertson* v. *Sichel*, 127 U.S. 507, 515 (1888):

> "Competent persons could not be found to fill positions of the kind if they know that they would be held liable for all the torts and wrongs committed by a large body of subordinates, in the discharge of duties which it would be utterly impossible for the superior officer to discharge in person."

This is also the reason why the courts have asserted that the wider the range and scope of discretion and responsibility of the public official, and the higher the office, the wider and more encompassing his immunity from liability will be. In other words, as the scope of discretion widens, the officer's decision becomes subject to less rigorous review. *Barr* v. *Matteo*, 360 U.S. 564, 572; *Jones* v. *Manson*, 17 Cr. L. 2153, 2154 (1975).

Whether Messrs. Santiago Vázquez and Negrón Ramos acted within the bounds of their lawful discretion and authority, and thus enjoy qualified immunity is a question of fact that was solved in their favor by the advisory jury in their verdict. The District Court held that:

> "The court finds from the evidence that the action, or lack of action taken by the defendants Santiago Vázquez and Negrón Ramos with respect to plaintiff's application for a permit to extract sand were in response to the recommendations of the other defendants who were the parties in the position to control the granting or denial of the permit."

The Court of Appeals found that ". . . the evidence supports the conclusion that defendants Vázquez and

Negrón Ramos acted within the bounds of their legal authority and discretion . . ."

Petitioner's thrust in asking this Court's review relies solely upon and analysis of the particular facts involved, and in essence consists of a request that this Court review evidence already ruled upon by an advisory jury, a District Court and a Court of Appeals. In situations such as this, this Court has held that "a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Manufacturing Co.* v. *Linde Co.*, 336 U.S. 271, 275 and cases cited; *Berenyi* v. *Immigration Director,* 385 U.S. 630, 635. The purpose of a Writ of Certiorari is not merely to give the defeated party in the Circuit Court of Appeals another hearing. *Magnum Co.* v. *Coty*, 262 U.S. 159, 163 (1923).

There is no conflict between the decision rendered in the case at bar and any other decision by a federal court; on the contrary, it closely follows this Court's doctrine as to qualified immunity. Nor is there a serious legal question involved since this case deals merely with determining whether under a highly specific and well-defined set of facts, certain government officers would be liable in damages to a certain corporation; this issue was solved pursuant to this Court's doctrine and petitioner fails to present a substantial legal issue which merits this Court's exercise of its discretionary jurisdiction.

Petitioner's allegations fail to go beyond a mere difference of opinion as to whether respondents' acts



were within the bounds of their lawful authority and discretion; it fails to present a constitutional or substantial legal issue. This does not constitute the jurisdictional basis on which certiorari may be granted, for which reason the writ should be denied.

**II. This Is Not a Proper Case for the Creation of Evidentiary Standards.**

Petitioner's second alleged error falls within the same arguments as above inasmuch as it also fails to go beyond the jury's evaluation of the evidence submitted. Since the jury in this case was advisory, and the District Court reached its own findings of facts independently, this is not a proper case in which to deal with charges to the jury. Furthermore, the charges to the advisory jury were discussed and agreed to by all parties before they were given to it. Finally, this question was never raised before the District Court or the Court of Appeals, and should not be considered for the first time on appeal to this court.

**III. Respondent's Action Did Not Cause Petitioner's Damages, and There Was No Proof of Petitioner Having Suffered Any Damages.**

The facts upon which petitioner pretends to fundament his claim for damages can be summarized as follows: He buys a farm for $6,400.00; through the years it increases in value to $1,600,000.00 because of the 800,000 cubic meters of sand therein are now worth $2.00 a cubic meter; he has suffered $500,000 in damages because of a delay in granting a permit to extract sand which is still in his land, and can be extracted since a permit to do so was issued. This contention is ludicrous and was rejected as such by both courts below.

The purpose of damages is to place plaintiff in the same position, so far as money can do it, as he would have been had there been no injury or breach of duty, that is, to compensate him for injury actually sustained. *Lee* v. *Southern Home Sites Corp.*, 429 F.2d 290 (1970). In order for there to exist liability for monetary damages under the Civil Rights Act there must be a showing that the defendant personally and directly participated in the acts that were violative of plaintiff's rights under federal law. *Jennings* v. *Davis,* 339 F. Supp. 919 (D.C. Mo.), affirmed 476 F.2d 1271 (1972). Damages must be proven; they may not be speculative and plaintiff must not be made more than whole. *Newton* v. *Rockwood & Co.*, 261 F. Supp. 485 (D.C. Mass.), affirmed 378 F.2d 315 (1966). Generally, in property damage cases the tort or contract liability of a party is limited to the difference in value between what the plaintiff's property is worth and what it would be worth but for the fault of the defendant. *Gleason* v. *Title Guarantee Co.*, 300 F.2d 813, 815 (1962); *Albrecht* v. *Herald Co.*, 452 F.2d 124 (1971). In other words, the basic goal of the court is compensation—that is, to award such an amount of money as will restore the injured party to the same property status which he occupied immediately prior to the injury. See *Albemarle Paper Co.* v. *Moody*, 422 U.S.405 (1975).

When monetary damages are sought under the Civil Rights Act, the doctrine of *respondent superior* does not suffice, and a showing of some personal responsibility of defendant is required. *Mukmuk* v. *Commissioner of Department of Correctional Services*, 369 F. Supp. 245 (D.C.N.Y. 1974).



The question of damages was clearly solved by the U.S. Court of Appeals in the opinion rendered in the case at bar in the following terms:

> "We next examine the issues of damages. The advisory jury awarded plaintiff $500,000 compensatory damages for losses sustained from the withholding of the permit to excavate sand. The court disregarded this finding and awarded only nominal damages in the sum of one dollar to the corporation on the ground that Cordeco had not actually suffered an economic loss. The court pointed to the uncontradicted evidence presented at trial indicating that in 1970, at the time of plaintiff's application, sand was selling in Puerto Rico for $1.00 per cubic meter and that by 1975 the price had risen to $2.00 per cubic meter. The court held that 'the sharp increase in [the] value [of sand] between 1970 and 1975 belies the conclusion that plaintiff was completely deprived of an extremely valuable asset,'' and that allowing the jury award 'would entail double recovery in this case since the sand remains on the land . . .'
>
> Plaintiff claims it is nevertheless entitled to a damage recovery because there has been a decrease in major construction and substantial decline in marketability of sand which makes it much more difficult to sell the commodity in 1974 and 1975 than had been earlier. The district court concluded, however, that despite the greater difficulty of selling sand, plaintiff had not suffered any loss because of the increased value of the sand in 1975. *The court also ruled that even if plaintiff had suffered an actual present loss, 'the amount has not been proven.' After careful examination of the entire record we are compelled to agree.*
>
> Plaintiff's theory of damages in this case is essentially analogous to that based on a claim of tortious interference with business relations. In

the instant situation such a theory would require evidence in the nature of loss of profits from sales of the sand, which of course would be offset by the value of the remaining asset. Here, inasmuch as evidence indicates a doubling in the selling price of sand over the relevant time period, see n.7 supra, plaintiff, to prove the fact of damage, must show that the decline in marketability of the sand decreased its 'real' value as an asset below the ostensible selling price; otherwise the value of the remaining sand would more than compensate for plaintiff's alleged lost profits. A party's financial loss is the ultimate measure of his damage, *PSG Co.* v. *Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 417 F.2d 659, 663 (9th Cir. 1969, cert. denied, 397 U.S. 918 (1970), and the purpose of a damage award is to compensate the injured party for loss resulting from the conduct of the wrongdoer, 'not to penalize the wrongdoer or to allow plaintiff to recover a windfall.' *Farmers and Banker Life Insurance Co.* v. *St. Regis Paper Co.*, 456 F.2d 347, 351 (5th Cir. 1972). See *Big Rock Mountain Corp.* v. *Stearns-Roger Corp.*, 388 F.2d 165, 169 (8th Cir. 1968). However, *plaintiff has failed to make the requisite showing.*

Although it introduced evidence to the effect that the marketability of sand had decreased, this evidence was of a very general nature, see n.9 supra, and provided no clear basis for calculating the extent to which the market decline had reduced the present value of the remaining sand as reflected in the current selling price. *In sum, we do not find in the record a sufficient basis for drawing a reasoned conclusion that the deprivation of profits overbalanced the substantial increment in value of the remaining sand.* And with respect to the amount of damages, while a plaintiff need not demonstrate the amount of damage with mathematical precision, see *Burns Bros. Plumbers, Inc.* v. *Groves Ventures Co.*, 412 F.2d 202, 209 (6th Cir. 1969); *DeVries* v. *Starr*, 393 F.2d 9, 18 (10th Cir. 1968) it must provide sufficient evidence to take the amount of damages out of the realm of speculation and conjecture. *Locklin* v. *Day-Glo Color Corp.* 429 F.2d 873, 879 (7th Cir. 1970), cert. denied 400 U.S. 1020 (1971); see *Tri-State Produce Co.* v. *Chicago, B. & Q. R. Co.*, 104 F. Supp. 452, 463 (N.D. Iowa 1952); cf. *Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251, 264 (1946). As the district court properly found, *plaintiff has here failed to meet that burden.*" (Footnotes omitted) (Our emphasis)



In essence, we are dealing with a two fold conclusion of both courts below: (a) respondents herein were not liable for damages, and (b) there was no showing of Cordeco Development Co. having suffered any damages.

Again, we are dealing, as in the earlier argument, with the analysis of highly specific facts, in this case the evaluation by the inferior court of damages. From all the evidence tendered, the courts below found that the evidence submitted showed that petitioner's land had increased in value enormously, and had suffered no damages. Petitioner's only argument, i.e., that there had been a decrease in the marketability of sand, was not supported by specific evidence, and found to be speculative.

In conclusion, petitioner's contention is merely an attempt that this Court reappraise the conclusions of the District Court and the Court of Appeals based on a highly specific set of facts, as to the amount of damages—if any—suffered by petitioner. This, considering all circumstances, is clearly not a proper matter for review by this Court.

### IV. Attorney's Fees

Since the reversal alluded to on petitioner's reasons number IV for granting the writ refers to codefendants Acevedo de Campos and Mercado, and not to respondents herein, we shall not discuss them. Attorney's fees have not been imposed on respondents herein at any time. Nevertheless, this is also a question of fact that has been solved, and amply fundamented, by the Court of Appeals, and is not a proper question for this Court to exercise its discretionary jurisdiction. See *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 420 U.S. 240; *Committee on Civil Rights of Friends* v. *Romney*, 518 F.2d 71 (1st Cir. 1975); *Victor Rivera Morales* v. *Celeste Benítez de Rexach, et al.*, No. 75-1265 (1st Cir., September 14, 1976).

## CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERTO ARMSTRONG, JR.
*Acting Solicitor General*
*of Puerto Rico*

RONALDO RODRIGUEZ OSSORIO
*Assistant Solicitor General*
*of Puerto Rico*
Department of Justice
San Juan, Puerto Rico

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

**No. 76-329**

CORDECO DEVELOPMENT CORPORATION,

*Petitioner,*

*against*

ANTONIO SANTIAGO VASQUEZ, INEZ ACEVEDO, as Sub-Secretary of the Department of Natural Resources of the Commonwealth of Puerto Rico, and individually; ZENON MERCADO MERCADO, as an Officer of the Department of Natural Resources, and individually; and PEDRO NEGRON RAMOS, individually and in his capacity as the Secretary of the Department of Natural Resources,

*Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

## REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

JOHN J. BOWER
*Counsel for Petitioner*
415 Madison Avenue
New York, New York 10017

JOHN J. BOWER,
MICHAEL M. FUTTERMAN,
CHARLES A. CORDERO,
*Of Counsel.*

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*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit**

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## REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

Petitioner received opposition to its petition for a writ of certiorari from respondents Antonio Santiago Vasquez and Pedro Negron Ramos on November 2, 1976. No opposition brief was filed by respondents Inez Acevedo de Compos and Zenon Mercado Mercado.

## Question Presented

### I. Qualified Immunity—Applicability to Public Officials Placing Responsibility Upon Subordinates.

Respondent Vasquez states that any wrong done to petitioner was by his subordinates, Inez Acevedo de Compos and Zenon Mercado Mercado. He maintains that the Department of Public Works was one of the largest governmental departments and could not function if its head had to accept responsibility for the errors of subordinates. Such position is stressed despite the fact that it is admitted that it was the Secretary, and not his subordinates, that was statutorily mandated to exercise discretion regarding the granting or denying of sand extraction permits.

1. Can the head of an executive department of government under a statutory duty to perform a delineated function claim a qualified immunity over his inaction by shifting any and all responsibility upon his subordinates even though evidence demonstrates that each party was aware of the facts and circumstances giving rise to such conduct?

## Reply Statement

Petitioner's initial statement adequately presents the significant facts germane to a decision herein. The reply statement shall not amplify upon those facts, but seeks only to clarify such misstatements as are contained in the respondents' counterstatement.



### 1949 Division of the Land in Question

Respondents Negron and Vasquez allege that they were justified in withholding the decision upon the Cordeco sand extraction application due to, inter alia, questions raised by the 1949 division of the Abreu property. Respondents' counsel patently misrepresents the unequivocal and unchallenged testimony of the drafter of the division, Hector Reichard, who testified that he divided the entire property among the six heirs without leaving a remnant.[1] It further went unchallenged that each land owner deriving title from the original division paid taxes not on a so-called reduced acreage, but on land up to the water's edge.[2] The "confusion" that "necessitated" withholding a decision upon the Cordeco application did not stop Secretary Vasquez from issuing permits to all others who claimed land under the 1949 division. With the exception of the Cordeco property, sand was uniformly removed and sold.[3]

### Iraction of Secretaries Vasquez and Ramos—Subordinate-Control Theory

Respondent Vasquez relies upon the theory of "subordinate-control" over the decision-making process concerning permit applications. Such theory, artfully tailored by counsel to the exigencies of appellate argument, fails to consider two points: (a) this theory was never presented by the respondent at trial—he chose to remain mute despite being present daily; (b) the clear and uncontradicted evidence that during his tenure as Secretary of the De-

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[1] Due to what must be deemed the conscious misstatements of counsel for the respondents, petitioner deems it prudent to refer the Court to the appellate appendix: A60, 62, 63.

[2] A83-84.

[3] A63.

partment of Public Works not a single landowner, other than Cordeco, was not granted a permit though each claimed under the same deed containing the same "ambiguities" found to apply to Cordeco's application. The empowering signature on each permit was not that of a subordinate, but of Secretary Antonio Santiago Vasquez —the individual statutorily mandated to grant or deny the permit applications. Reality does not disappear merely by turning one's back on it.

The bureaucratic machinations of respondent Negron who failed to act though possessing full knowledge of the facts and circumstances of the Cordeco application and the nullity known as the "Matos permit" deserve no further comment.

## REASONS FOR GRANTING THE WRIT

### I. The decision below granting immunity to executive officials who failed to perform their statutory duty is in direct conflict with the principles of qualified immunity as stated by this Court.

Petitioner's reply shall answer only such points as are raised in respondents' brief. Although respondents in essence argue the merits of petitioner's claim below, as opposed to the merits of the petition, such argument underscores the necessity for granting a writ of certiorari.

#### Reliance on Subordinate Conduct in Seeking Immunity

Secretary Vasquez states that the wrongs committed by respondents Acevedo and Mercado should not be imputed upon him as he was the head of a large department of government and cannot be held accountable for the conduct



of his subordinates. As stated, this theory was never raised at trial—Vasquez choosing not to utter a word in his own defense.

In support of this position, respondent cites to the cases of *Barr* v. *Matteo,* 360 U.S. 564 (1959) and *Robertson* v. *Sichel,* 127 U.S. 507 (1888). *Barr* is the definitive case upon absolute as opposed to qualified immunity and does not treat the question of superior versus subordinate responsibility. *Robertson* involved a tort action against a customs commissioner wherein the sole wrong done to the plaintiffs was by subordinate dock inspectors carrying out a discretionary function (customs assessment). Contrary to the present action, there were no direct allegations against the commissioner, that action being prosecuted solely upon the theory of respondeat superior. Herein, Secretary Vasquez met with respondents Acevedo and Mercado, singled Cordeco out for particularized treatment, and allowed it to languish without a permit while all others similarly situated to Cordeco extracted and sold their sand. The responsibility of Secretary Vasquez for his failure to exercise discretion and grant or deny the application, as was *his* statutory duty, cannot now be placed solely upon his subordinates' shoulders. Even if such subordinates were in error in advising certain conduct, their responsibility was not alone, for it was the Secretary's statutory responsibility to insure that the application was formally granted or denied—not allowed to remain unresolved during his entire tenure in office.

In promulgating its recent decisions in the area of qualified immunity, this Court has not defined the scope of an administrator's reliance upon the decisions of his subordinates. The question to be answered is clearly not that raised within the *Robertson* case, wherein the official in question had no contact with the wrong, but is apparently

sued because of his representative capacity. The matter is not answered by *Barr* and its progeny, wherein the rationale behind the overruled theory of absolute immunity for executive officials was to allow such officials to function without the threat of an action seeking money damages, the sole caveat being whether the official in question performed within the scope of his responsibilities. Nor is the matter answered where an official affirmatively performs a discretionary function, by relying upon opinions of his subordinates. Herein, whereas the inaction of Vasquez is alleged to be in reliance upon his subordinates, it is never the less clear that he did not exercise the discretionary function he was statutorily mandated to carry out. The doctrine of qualified immunity must be further amplified by this Court to define whether an executive official, aware of the facts and circumstances behind an administrative decision and under a statutory *duty* to *exercise* discretion may decline to exercise that discretion and then demand an immunity over his inaction stating, as one of his reasons, that any wrong done was committed by those in a lower echelon of government. It is to this Court that the time is ripe to juridically define the concept—"the buck stops here."

## II. Attorney's Fees.

A review of the order of the court below is sought against all respondents—not merely Acevedo and Mercado. Such shall be argued should the Court grant the instant petition. The reasons in favor of such a decision were amply covered in the original petition.



## CONCLUSION

**For the foregoing reasons the petition for a writ of certiorari should be granted.**

Respectfully submitted,

JOHN J. BOWER
*Counsel for Petitioner*

JOHN J. BOWER,
MICHAEL M. FUTTERMAN,
CHARLES A. CORDERO,
*Of Counsel.*